RECEIVED
JAN 12 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

83-6084

WILLIAM NEAL MOORE,

Petitioner

v.

CHARLES BALKCOM, Warden,
ARTHUR K. BOLTON, Attorney General,

Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DANIEL J. GIVELBER
Northeastern University
School of Law
400 Huntington Avenue
Boston, Massachusetts 02115
(617) 437-3943

COUNSEL OF RECORD

DANIEL J. GIVELBER
DONALD H. BERMAN
Northeastern University
School of Law
400 Huntington Avenue
Boston, Massachusetts 02115
(617) 437-3943
(617) 437-3346

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1. Does petitioner's death sentence violate Eddings v. Oklahoma, 455 U.S. 104 (1982) and Lockett v. Ohio, 438 U.S. 586 (1978) when a sentencing judge refuses to consider relevant mitigating circumstances and believes that the death sentence is required mandatorily for certain crimes?

2. Did the Circuit court err in reversing the District court's determination that petitioner's arbitrary and freakish death sentence was not corrected by Georgia appellate review when: (a) the Georgia Supreme Court compared similar crimes and ignored its constitutional and statutory obligation to compare the sentences received by comparable defendants; (b) the Georgia courts denied the petitioner any forum in which to identify, examine, supplement or comment upon the record of cases relied upon for comparability review; and (c) the Circuit court barred any federal habeas examination of the comparability record used by the Georgia Supreme Court?

3. In the rare instance of a plea in a capital case, do the Eighth and Fourteenth amendments to the United States Constitution sanction plea proceedings that totally failed to ascertain whether a defendant knowingly pled to an essential element of the crime -- i.e. intent?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Citation to Opinions Below	1
Statement of Jurisdictional Grounds	1
Constitutional Provisions Involved	2
Statement of the Case	2
Reasons for Granting The Writ	10
1. The Circuit court violated this Court's decision in Eddings v. Oklahoma by failing to require resentencing when the sentencer thought himself precluded from considering mitigating circumstances.	10
2. The Circuit court erred in reversing the District court's determination that petitioner's aberrant death sentence had not been corrected by Georgia appellate review and in barring the District court from reviewing the record developed and considered by the Georgia Supreme court.	13
3. The Circuit court erred in permitting a conviction based upon a plea to a capital offense to stand when the record of the sentencing proceedings demonstrates that the offender did not understand the elements of the crime.	23
Conclusion	26
Appendices:	
A. Moore v. Balkcom, 716 F. 2d 1511 (11th Cir. 1983) and the slip opinion of the modification thereto, dated December 13, 1983.	A1
B. Moore v. Balkcom 709 F. 2d 1353 (1983)	A22
C. Blake v. Zant 513 F. Supp. 772 (S.D. Ga. 1981)	A39
D. Moore v. Hopper Civil Action No. 78-22 (Superior Court, Tattnall Cty. July 13, 1978)	A65
E. Moore v. State 239 Ga. 67 (1977)	A81
F. Moore v. State 233 Ga. 861 (1974).	A83
G. Official Code of Georgia Annotated (OCGA) 17-10-35	A94

TABLE OF AUTHORITIES

Cases:

Allen v. State, 231 Ga. 17, 200 S.E. 2d 106 (1973) 7, 8

Barclay v. Florida, __ U.S.___, 103 S. Ct. 3418 (1983) 13

Birt v. Hopper, 245 Ga. 221, 265 S.E. 2d 276 (1980) 4

Blake v. State, 239 Ga. 292, 236 S.E. 2d 637, cert. denied, 434 U.S. 960 (1977) 18

Boykin v. Alabama, 395 U.S. 238 (1969) 23

Brown v. Allen, 344 U.S. 443 (1953) 19

California v. Ramos, ___U.S.___, 103 S. Ct. 3446 (1983) 11, 21

Chenault v. Stynchcombe, 581 F. 2d 444 (5th Cir. 1978) 10

Coleman v. State, 378 So. 2d 640 (Miss. 1979) 15

Creamer v. State, 232 Ga. 136, 205 S.E. 2d 240 (1974) 7, 8

Eddings v. Oklahoma, 455 U.S. 104 (1982) 9,10,11 passim

Emmett v. State, 232 Ga. 110, 205 S.E. 2d 231 (1974) 8

Frank v. Magnum, 237 U.S. 309 (1915) 19

Furman v. Georgia, 408 U.S. 238 (1972) 17

Gardner v. Florida, 430 U.S. 349 (1977) 22

Godfrey v. Georgia, 446 U.S. 420 (1980) 14, 21

Goodwin v. Balkcom, 684 F. 2d 794 (11th Cir. 1982) 10

Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) 21, 22

Gregg v. State, 233 Ga. 117, 210 S.E. 2d 659 (1974), affd. as Gregg v. Georgia, 428 U.S. 153 (1976) 8, 13, 17

Hall v. State, 241 Ga. 252, 244 S.E. 2d 833 (1978) 17

Harrell v. State, 108 Ga. App. 295, 132 S.E. 2d 787 (1963) 23

Henderson v. Morgan, 426 U.S. 637 (1975) 23

Hicks v. Oklahoma, 447 U.S. 343 (1980) 21

Jackson v. Virginia, 443 U.S. 307 (1979) 20, 21

Johnson v. State, 226 Ga. 511, 175 S.E. 2d 840 (1970) 7, 8

Jurek v. Texas, 428 U.S. 262 (1976) 15

Kramer v. State, 230 Ga. 855, 199 S.E. 2d 805 (1973) 8

Lingo v. State, 226 Ga. 496, 175 S.E. 2d 657 (1970) 8

Lockett v. Ohio, 438 U.S. 586 (1978) 9,10,11,12 passim

McCarthy v. United States, 394 U.S. 459 (1969) 24

Moore v. Balkcom, sub. nom., Blake v. Zant, 513 F. Supp. 772 (S.D. Ga. 1981) 2,8,9 passim

Moore v. Balkcom, 709 F. 2d 1353 (11th Cir. 1983) 9, 11

Moore v. Balkcom, 716 F. 2d 1511 (11th Cir. 1983) 9,10,12 passim

Moore v. Balkcom, No. 81-7418, on Petition for Rehearing and Suggestion for Rehering En Banc, Slip Opinion (11th Cir., December 13, 1983) 10

Moore v. Hopper, Civil Action No. 78-22 (Superior Court, Tattnall County, July 13, 1978) (unpublished opinion) 3,6,7, passim

Moore v. State, 233 Ga. 861, 213 S.E. 2d 829 (1974), cert. denied 428 U.S. 910 (1976) 5,13,17

Moore v. State, 239 Ga. 67 235 S.E. 2d 519, cert. denied, 434 U.S. 878 (1977) 6

Nash v. Israel, 707 F. 2d 199 (7th Cir. 1983) 24

Pass v. State, 227 Ga. 730, 182 S.E. 2d 779 (1971) 5,8

Profitt v. Florida, 428 U.S. 242 (1976) 15

Pulley v. Harris, cert. granted, No. 82-1095 (U.S. S. Ct. 1983),14 sub. nom., Harris v. Pulley, 692 F. 2d 1189 (9th Cir. 1982)

Redd v. State, 242 Ga. 876, 252 S.E. 2d 383 (1979) 15

Scott v. State, 230 Ga. 413, 197 S.E. 2d 338 (1973) 8

Sims v. State, 229 Ga. 33, 189 S.E. 2d 68 (1972) 7

Spinkellink v. Wainwright, 578 F. 2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979) 19

Spivey v. Zant, 661 F. 2d 397 (5th Cir. 1981) 10

Strozier v. Hopper, 234 Ga. 597, 216 S.E. 2d 847 (1975) 18

Sumner v. Mata, 455 U.S. 581 (1982) 20

Vitek v. Jones, 445 U.S. 480 (1979) 21,22

Waddy v. Heer, 383 F. 2d 789 (6th Cir. 1967) 24

Ward v. State, 239 Ga. 205, 236 S.E. 2d 365 (1975) 17

Warren v. State, 562 S.W. 2d 474 (Tex. 1978) 15

Watson v. State, 229 Ga. 787, 194 S.E. 2d 407 (1971) 8

Westbrook v. Zant, 704 F. 2d 1487 (11th Cir. 1983) 10

Woodson v. North Carolina, 428 U.S. 280 (1976) 10,12

Zant v. Gaddis, 247 Ga. 717, 279 S.E. 2d 219 (1981) 4

Zant v. Stephens, ___U.S.___ 103 S. Ct. 2733 (1983) 4,10,12,passim

STATUTES

Georgia Code Annotated (Ga. Code Ann. 26-1101(A)(1978) 23
Official Code of Georgia Annotated 17-10-35, 5,15,16
Official Code of Georgia Annotated 17-10-37 7, 15
28 U.S.C. §2254 19, 20
28 U.S.C. §2241 19
Vernon Annotated Code of Criminal Procedure, (V.A.C.C.P.), Article 37.071b(2) 15

No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

WILLIAM NEAL MOORE,

Petitioner

v.

CHARLES BALKCOM, Warden
ARTHUR K. BOLTON, Attorney General,

Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner William Neal Moore, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

CITATION TO OPINION BELOW

Moore V. Balkcom, 716 F. 2d 1511 (11th Cir. 1983) and the slip opinion of the modification thereto, dated December 13, 1983, are attached as Appendix A to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on September 30, 1983. A timely suggestion for rehearing en banc was denied on December 13, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1)

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Defendant and the Crime

William Neal Moore was, on April 2, 1974, a twenty-two year old black serviceman from Ohio with no adult criminal record. After a night of drinking, Moore broke into a home in Wrens, Georgia. He was confronted by the homeowner who fired at him with a shotgun. Both frightened and drunk, he fired back, killing the homeowner. The following day, petitioner was arrested at his home. After showing the police the shotgun and the money, he was taken to Wrens, Georgia. At 2:00 a.m., on April 4, 1974, Moore gave a statement concerning the shooting of the victim. Moore v. State, 233 Ga. 861-2, 213 S.E. 2d 829, 830-831 (1974) cert. denied 428 U.S. 910 (1976).

Four months prior to petitioner's actions an elderly white couple had been tortured and murdered in their home in Wrens (pop. 2300). When petitioner faced sentencing, the murders remained unsolved. Recognizing that widespread fear and anger permeated the area, petitioner pled guilty and waived a jury for sentencing because his counsel did not think "we had any chance whatsoever with a jury in Jefferson County at the time." Transcript State Habeas, p. 46.(hereafter "S.Hab.T.")

Plea and Sentencing Hearing

Petitioner pled guilty to malice murder and armed robbery at his arraignment on June 4, 1974. In accepting the plea, Judge McMillan of the Jefferson County Superior Court, rather than

reading the indictment, only told Moore that the charge was that he "did on the second day of April 1974, kill one Fredger Stapleton with a certain pistol, contrary to the law of the State of Georgia..." Transcript of June 4, 1974 Arraignment, 1 (hereafter "Arr.T.") The judge mentioned that the crimes were Murder and Armed Robbery. He inquired whether petitioner understood the nature of the charges, but he neither offered any explanation of any of the elements of either crime charged (or of felony murder) nor asked whether petitioner's counsel had explained them.

The sentencing hearing was held on July 17, 1974. The prosecutor defined the question as "whether or not there is aggravation in this matter sufficient, under the code Section, to require the Court to impose the death penalty." Transcript State Sentencing Hearing 4 (hereafter Sen. T.) (emphasis supplied). The state presented the testimony of the medical examiner and investigating officers. Following the state's presentation of its case -- which rested almost exclusively on petitioner's confession and the results of a nighttime search of his dwelling -- petitioner's four brothers and sisters and petitioner testified. Petitioner's counsel asked no questions of the petitioner's siblings nor did he make any reference whatsoever to the 74 page pre-sentence report submitted to the court.[1/] He only requested of petitioner, who was under oath, that he "try as best you can to tell the Judge how you got mixed up and how you came about doing this thing and how you feel about it." Sen. T. 48. Petitioner then briefly described the circumstances leading up to his drunken, unintentional shooting of Fredger Stapleton. "I didn't have no intention of killing him. When I went in there, he came out there with a shotgun and hit me in the leg, it scared me, made me shoot him . . . " Sen. T. 48. Although Moore's lack of intent was confirmed by the physical facts, neither the District Attorney nor the sentencing judge asked petitioner anything about his

[1/] Both petitioner and his counsel insist that they were never shown a copy of the pre-sentence report which contains material inaccuracies. S. Hab. T. 18-19, 40-41. The state habeas court disbelieved petitioner's counsel in this respect and instead credited an affidavit submitted by the probation officer four years after the event. Moore v. Hopper Civ. Act. No. 78-22 at 8-9 (Sup. Ct., Tattnall Cty. July 13, 1978). Whatever the cause, the pre-sentence report stood unchallenged and uncorrected.

description of the killing, his denial of intent, or his understanding of the crime to which he had pled. The prosecutor cross-examined petitioner solely with respect to whether he claimed any interest in the money that had been recovered. The judge asked no questions.

Judge McMillan offered a lengthy explanation for imposing the death sentence. He explained that he had "many, many reservations about whether there will be an execution by government authorities in this country ever again." Sen.T. 55. He doubted whether discretionary, as opposed to mandatory, capital punishment schemes would pass constitutional muster. Sen. T. 52, 55. Next, he stated that he could not consider whether his sentence constituted "evenhanded justice,"

> Now I can't make that determination. The law does not place that discretion in me. It places that discretion solely within the jurisdiction of the Supreme Court of Georgia. Sen. T. 55-56.

Finally, he expressed his feelings that this offense required the imposition of the death penalty, precluding consideration of mitigating factors in petitioner's case.

> So, I feel like that if the Court ever does require mandatory punishment -- that is when they specify by law what offenses will have to be suffered by the electric chair -- that one of these statutory offenses probably will be that when a person is robbed and killed in his home, that mandatory, as contrasted to discretionary, statutory aggravating circumstances will probably warrant the electric chair without life imprisonment. That justifies me in making the finding that I made. Sen.T. 56-57.

Six months after Judge McMillan sentenced petitioner to death, those responsible for the murder of the elderly couple were tried before Judge McMillan. He improperly instructed the jury. He failed to inform them that they remained free to impose a life sentence even if they found an aggravating circumstance. As a result, the two of three defendants who received death subsequently had their sentences overturned. Birt v. Hopper 245 Ga. 221, 265 S.E. 2d 276 (1980); Zant v. Gaddis 247 Ga. 717, 279 S.E. 2d 219 (1981).

Direct Appeal

On appeal to the Georgia Supreme Court, petitioner's counsel raised the comparability issue. He submitted affidavits to the Georgia Supreme Court which identified cases from neighboring

counties in which defendants had received life sentences for crimes of greater seriousness. The Supreme court refused to consider them, noting that they had not been considered by the trial judge. Moore v. State, 233 Ga. 861, 864, 213 S.E. 2d 829, 832 (1974) cert. denied 428 U.S. 910 (1976). It then identified what it viewed its obligation to be ". . . this court is not required to determine that less than a death sentence was never imposed in a case with some similar characteristics. On the contrary, we view it to be our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally and not "wantonly and freakishly imposed . . . ." Id.

As required by Georgia law, Official Code of Georgia Annotated (OCGA) 17-10-35(e)(1982), the Georgia Supreme Court identified a pool of twenty-three comparable cases against which it measured Moore's sentence. These cases involved murders during robberies and burglaries. In fourteen cases, the defendant had received life and in nine, death. Pointing to seven of the cases in which the defendant received death, the Georgia Supreme Court concluded that Moore's sentence was not disproportionate. "In each of the companion cases cited, the records show that the accused was found guilty of murder of the victim of a robbery or burglary committed in the course of such robbery or burglary. In each of these cases, the jury imposed the sentence of death. In Pass v. State, the murder took place in the victim's home, as occurred in the case under consideration." 233 Ga. at 865-6, 213 S.E.2d at 833. The court then noted that although life had been granted in a number of the cases it examined, "the cited cases show that juries faced with similar factual situations have imposed death sentences" and therefore Moore's sentence was not "wantonly and freakishly imposed." Id

The Georgia Supreme Court noted Moore's cooperation with the authorities, his plea, his waiver of a sentencing jury, his youth, his lack of a criminal record, his intoxication, and his firing out of fright in response to the victim's shotgun blast, 233 Ga. at 865, 213 S.E. 2d at 832. Nevertheless it did not compare his sentence with those received by defendants presenting comparable

mitigating circumstances. Since Georgia law does not provide for notice of the cases which the Supreme court will consult for measuring comparability, petitioner's counsel was not able to offer any argument concerning either the pool of cases considered or the cases ultimately deemed comparable.

State Collateral Relief

Following this Court's denial of Moore's petition for certiorari 428 U.S. 910 (1976) and his unsuccessful attempt to secure a declaratory judgment, Moore v. State 239 Ga. 67, 235 S.E. 2d 519 cert. denied 434 U.S. 878 (1977), petitioner sought habeas corpus relief from the Superior Court of Tattnall County, Georgia. However, petitioner was unable to challenge comparability review in those proceedings. The Superior Court of Tattnall County ruled that it could not reconsider an issue which the Georgia Supreme court had resolved on direct review. Moore v. Hopper, Civ. Action No. 78-22 at 15-16 (Sup. Court, Tattnall County, July 13, 1978).

Petitioner also challenged the intelligence and voluntariness of his plea in the state habeas corpus proceedings. Petitioner testified that he did not understand the elements of malice murder, armed robbery or felony murder. S. Hab. T. 22, 34. His counsel testified that he had explained to Moore the elements of the crimes charged, although he could not remember whether he ever informed petitioner about the role of intent. He testified that intent was not important.

> Q. Did you tell him in, in the course of those discussions, that he can be convicted of murder not withstanding the intent or the lack of intent to kill?
> A. I'm not sure, I really, I don't know.
> Q. Uh, do you recall telling him that his lack of a specific intent to kill Mr. Stapleton was, would not amount to any kind of defense?
> A. Well, I didn't think it would under what we had. Here's a man who's broken into somebody's home with a, a .38 caliber gun.
> Q. Yes, sir, I mean, you're right.
> A. Yes, sir.
> Q. I mean.
> A. Uh, that clearly to me was a case of uh, felony murder. S. Hab. T. ___, 52-53 (emphasis supplied)

The state habeas judge believed petitioner's counsel and found that he had described the elements of the crimes charged to petitioner (felony murder was not charged). Moore v. Hopper, Civ.

Action No. 78-22, 4, 7 (Sup.Court, Tattnall County, July 13, 1978). The state habeas judge made no findings concerning what petitioner actually understood. The Supreme Court of Georgia denied petitioner's application for a certificate of probable cause to appeal on October 17, 1978.

Federal Habeas - The District Court

Petitioner did introduce the record relied on by the Georgia Supreme Court in connection with his federal habeas corpus petition filed in the Southern District of Georgia on November 22, 1978. That record consisted of the opinions in the twenty-three cases, summaries of each of the cases describing the crime, and the six page judge's report for each case. All the summaries and the judge's reports for the 1970-1973 cases were prepared by the special assistant to the court pursuant to his statutory duties, which required him to provide the Supreme Court:

> with whatever extracted information it desires with respect thereto, including, but not limited to, a synopsis or brief of the facts in the record concerning the crime and the defendant.

OCGA 17-10-37(a)&(b)(1982) Transcript Federal Habeas, 16, 21, 22, 26 (hereafter "Fed.Hab.T.").

Of the twenty-three cases, only two -- Johnson (Eddie Lee) v. State, 226 Ga. 511, 175 SE 2d 840 (1970); and Sims v. State, 229 Ga. 33, 189 SE 2d 68 (1972),[2/] -- involved even a single mitigating circumstance. In both of these cases the defendants received life. No other defendant -- neither the twelve who received life nor the nine who received death -- had a single mitigating factor arguing for him.

Four of the twenty-three cases involved robbery/burglary murder within the victim's home. In three cases, Creamer v. State, 232 Ga. 136, 205 S.E. 2d 240 (1974); Allen v. State, 231 Ga. 17, 200 S.E. 2d 106 (1973); and Emmett v. State, 232 Ga. 110, 205 S.E. 2d 231 (1974), the defendant received life although each involved double murders by defendants who presented no mitigating

[2/] The summaries, trial judge reports, and opinions in the twenty-three cases are contained in Appendices C, D and E to Petitioner's Memorandum of Law submitted to the federal district court.

circumstances. Two of these cases involved defendants with lengthy criminal records, over forty years of age, Allen v. State, supra; Creamer v. State, supra. The one case in which death was imposed was a pre-Furman case. It involved a black man, Pass, who was convicted of the double murder of a white couple. The couple had been shot in the head after one of them was beaten with a baseball bat during a burglary of their home. Pass v. State, 227 Ga. 730, 182 S.E. 2d 779 (1971). There were no mitigating circumstances and Pass recanted his confession and presented an alibi defense.

The seven cases identified by the Georgia Supreme Court as justifying Moore's death sentence included only one (Gregg v State, 233 Ga. 117, 210 SE 2d 659 (1974), aff'd 428 U.S. 153 (1976)) imposed under the post-Furman Georgia statute. That case involved an execution-style, double murder. The other six involved either defendants with lengthy criminal records who engaged in violent criminal behavior toward more than one person [Scott v. State, 230 Ga. 413, 197 SE2d 338 (1973), (two murders),Watson v. State, 229 Ga. 787, 194 SE2d 407 (1971), (rape and kidnapping of a woman in addition to murder of a man) and Kramer v. State, 230 Ga. 855, 199 S.E. 2d 805 (1973), (murder of one victim, attempted murder of the other)] or pre-Furman crimes involving Black defendants and white victims. Pass, supra; Lingo v. State, 226 Ga. 496, 175 S.E.2d 657 (1970); Johnson v. State, 226 Ga. 511, 175 SE2d 840 (1970). As noted, no case presented any mitigating circumstances.

The District Court examined the twenty-three cases and the summaries considered by the Georgia Supreme Court. It concluded that petitioner's death sentence violated the Eighth and Fourteenth Amendments of the United States Constitution because (1) the Georgia Supreme Court did not consider similar cases and (2) upholding this death sentence would "shock the conscience." Moore v. Balkcom sub nom Blake v. Zant, 513 F. Supp. 772, 816-817 (S.D. Ga. 1981). Then, the Federal District Court, seeking to find similar cases that might sustain the sentence, looked outside the record compiled by the Georgia Supreme Court. Since it found no such cases it set aside the petitioner's death sentence. Moore v. Balkcom, supra at 816.

The District Court denied petitioner's claim that his plea was

unconstitutional. Relying on the testimony of petitioner's counsel at the state habeas corpus proceedings the court found that the plea was knowing and intelligent. Moore v. Balkcom, supra at 806-808.

Federal Habeas - the Circuit Court of Appeals

On appeal the Eleventh Circuit Court of Appeals issued two different decisions, plus one modification. In each instance, it upheld the District Court's ruling on the plea and reversed the District Court's ruling regarding the arbitrariness and capriciousness of Moore's sentence.

In reversing, the Circuit court held

> A federal habeas court should not undertake a review of the state supreme court's proportionality review and, in effect, "get out the record" to see if the state court's findings of fact, their conclusion based on a review of similar cases, was supported by the "evidence" in the similar cases. To do so would thrust the federal judiciary into the substantive policy making area of the state.

Moore v. Balkcom, 716 F. 2d 1511(1983). (Moore II)

However, in the first decision, Moore v. Balkcom, 709 F. 2d 1353 ("Moore I") issued June 23, 1983, the Eleventh Circuit affirmed the District Court's decision on another ground. While on appeal, the petitioners by letter dated February 24, 1982, called to the attention of the Circuit court this Court's decision in Eddings v. Oklahoma, 455 U.S. 104 (1982). In Eddings, this Court held that (1) even though a statute does not mandate the death penalty the sentencer must know that he is free to consider any mitigating circumstances and (2) a death penalty conviction cannot stand when the sentencing judge has applied ambiguous legal standards.

The Circuit court rested its decision in Moore I on two grounds: first, that the sentencing judge unconstitutionally applied a non-statutory aggravating circumstance, Moore I at 1366-67, and second, that the sentencing judge imposed a mandatory death sentence that "eliminated consideration of valid mitigating circumstances". Id. at 1366, n. 16, citing Lockett v. Ohio, 438 U.S. 586 (1978).

On the basis of this Court's June 22, 1983 decision in Zant v.

Stephens, 103 S. Ct. 2733 (1983) the respondents moved for rehearing. By letter dated August 10, 1983 petitioners responded that this Court's decision in Zant v. Stephens did not affect that portion of the opinion finding failure to consider mitigating circumstances. This Court expressly had reaffirmed the need for

> "an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 103 S.Ct. at 2744, citing Eddings v. Oklahoma, 455 U.S. 104, 110-112 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); and Woodson v. North Carolina, 428 U.S. 280, 303-304 (1976).

On September 30, 1983, the Circuit court decided Moore v. Balkcom 716 F. 2d 1511 (11th Cir. 1983). In Moore II the court reinstated petitioner's death sentence holding that (1) Zant v. Stephens, no longer precluded a sentencer from utilizing non-statutory aggravating circumstances and (2) "the analysis used by the Georgia Supreme Court in conducting its mandatory proportionality review" validated whatever errors the sentencing judge might have committed.

Petitioner then sought rehearing on the ground that appellate review cannot cure the sentencer's failure to understand his responsibility to consider all relevant mitigating circumstances. Eddings v. Oklahoma, 455 U.S 104 (1982); Goodwin v. Balkcom, 684 F. 2d 794, 798 (11th Cir. 1982); Spivey v. Zant, 661 F. 2d 397, 471 (5th Cir. 1981); Westbrook v. Zant, 704 F. 2d 1487 (11th Cir. 1983); Chenault v. Stynchcombe, 581 F. 2d 444 (5th Cir. 1978).

On December 13, 1983, the Circuit court again modified its opinion holding that the sentencing judge had considered all mitigating circumstances and fully understood the range of his sentencing discretion. Moore v. Balkcom, No. 81-7418, on Petition for Rehearing and Suggestion for Rehearing En Banc slip.op. (11th Cir. 1983)("Moore III").

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD SUMMARILY REVERSE THE CIRCUIT COURT FOR REFUSING TO FOLLOW THIS COURT'S DECISION IN EDDINGS V. OKLAHOMA REQUIRING RESENTENCING WHEN THE SENTENCER THOUGHT HIMSELF PRECLUDED FROM CONSIDERING MITIGATING CIRCUMSTANCES.

Since 1976, this court has made clear that a state can not constitutionally mandate the imposition of the death penalty. Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio,

438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1981). Even though a statute does not mandate the death penalty the sentencer must know that he is free to consider any mitigating circumstances.

> ...Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer, refuse to consider, as a matter of law, any relevant mitigating evidence...

Eddings v. Oklahoma, 455 U.S. 104 (1982) at 113-114 (Powell, Brennan, Marshall, Stevens, O'Conner, JJ)(citations omitted)

The record clearly establishes that the sentencing judge in this case, like the judge in Eddings, did not understand the law governing his discretion when imposing a death sentence. First, he stated his belief that there would never be another execution in this country. (Sen. T. 55). Secondly, he "justifie[d]" his sentence on the ground that homicides committed during the robbery of a victim's home would mandate the imposition of the death penalty. (Sen. T. 57). He absolutely refused to consider the "evenhandedness" of his sentence -- "the law does not place that discretion in me. It places that discretion solely within the discretion of the Supreme Court." (Sen. T. 56).[3/] Finally, he stated that before imposing a life sentence the mitigating circumstances must "wipe out" the aggravating ones. (Sen. T. 56)

The Circuit court in Moore I correctly held that the sentencing judge imposed a mandatory death sentence.

> Here, we have a case where the murder having occurred in the victim's home, Judge McMillan viewed the death penalty as mandatory. This error eliminated consideration of valid mitigating circumstances that might otherwise have been considered and this constituted error of constitutional magnitude....See Lockett v. Ohio..., 438 U.S. 586 (1978).

Moore v. Balkom, 709 F. 2d at 1336 n. 16 (11th Cir. June 30, 1983) (emphasis supplied)

> Judge McMillan imposed this sentence after Furman but before Gregg and Woodson when reasonable interpreters of Furman could conclude that there could be no discretion and that ultimately, discretion would be absolutely eliminated by mandatory death sentences for specified crimes. Judge McMillan "justified" his sentence on the belief that murder in the victim's home would

[3/] It would have been fatal error for the judge to have instructed a jury in this manner since it might lead them to doubt the finality of their sentencing determination. cf. California v. Ramos, 103 S.Ct. 3446, 3458 (1983).

require a mandatory death sentence.

Id. at 1366.

> ...Judge McMillan unconstitutionally applied a non-statutory aggravating circumstance, necessarily precluding consideration of mitigating circumstances. Although his analysis at the time was consistent with that of other scholars, later cases teach us its faults.

Id. at 1367 (emphasis supplied)

Even the Circuit court in Moore II recognized the serious uncertainty surrounding Judge McMillan's understanding of the law when it prefaced its conclusion with

> One could interpret Judge McMillan's language that capital punishment would likely become mandatory in cases involving murder and robbery in the victim's home as a non-statutory aggravating a factor which precluded consideration of mitigating factors.

Moore II at 26-27. (emphasis supplied).

More obviously, the Circuit court demonstrated the lack of reliability inherent in petitioner's sentence by (1) initially interpreting Judge McMillan's language as mandating the death sentence and precluding consideration of mitigating circumstances; (2) substituting a second opinion that implicitly recognized this error while relying on the proportionality review of the Georgia Supreme court to buttress its conclusion that Moore had received individualized sentencing;[4/] and (3) modifying the substituted

4/ In Moore II, the panel, in light of Zant v. Stephens, U.S. , 103 S.Ct. 2733 (1983) modified its view and concluded that Judge McMillan's sentence comported "with the constitutional requirement of an individualized sentencing decision." Id. at 1524. The petitioner maintains that Zant v. Stephens, supra changed nothing in regard to defendant's right to be sentenced by a judge who understood that the law never requires the imposition of the death sentence.

This Court in Zant v. Stephens decided only that a sentencer may, in certain limited circumstances, consider a non-statutory aggravating circumstance. It did not hold that a sentencer can refuse to consider mitigating circumstances. Indeed, this Court expressly reaffirmed the need for "an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, Id. at 2744 citing Eddings v. Oklahoma, 455 U.S. 104, 110-112 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); and Woodson v. North Carolina, 428 U.S. 280, 303-304 (1976).

This Court sanctioned the Georgia court's use of a non-statutory aggravating circumstance on the grounds that the jury (a) had found the presence of two legitimate aggravating circumstances, (b) had received proper instructions that they had the discretion to impose either life or death, and (c) under Georgia law could have considered the evidence of the defendant's prior criminal

opinion to hold that Judge McMillan had considered all mitigating circumstances, a conclusion that even the Georgia Supreme Court had eschewed;[5/] a conclusion flatly rejected by this same panel in Moore I and totally unsupported by the record.

Thus, this court should grant the writ of certiorari and summarily reverse that part of the decision of the court below that holds that sentencing judge imposed a death sentence in conformity with Eddings v. Oklahoma, supra.

II. THE CIRCUIT COURT ERRED IN REVERSING THE DISTRICT COURT'S DETERMINATION THAT GEORGIA UNCONSTITUTIONALLY IMPOSED AN ARBITRARY AND FREAKISH DEATH SENTENCE: (A) THE SENTENCING JUDGE IMPOSED AN ABERRANT DEATH SENTENCE; (B) THE GEORGIA SUPREME COURT APPLIED AN INADEQUATE TEST FOR COMPARABILITY; (C) PETITIONER WAS DENIED ANY OPPORTUNITY IN ANY GEORGIA FORUM TO IDENTIFY, EXAMINE, SUPPLEMENT OR MAKE ARGUMENTS CONCERNING THE RECORD OF CASES RELIED UPON FOR THE COMPARABILITY ANALYSIS; AND (D) THE COURT OF APPEALS BARRED FEDERAL HABEAS REVIEW OF THE RECORD BEFORE THE GEORGIA SUPREME COURT

A. The Sentencing Judge Imposed an Aberrant Death Sentence.

Petitioner's sentence was imposed arbitrarily and capriciously. The sentencing judge was mistaken in his understanding of Eighth Amendment jurisprudence, misunderstood the range of his sentencing discretion, and focused on one circumstance of the crime to the exclusion of the array of mitigating factors concerning the defendant. This Court in Gregg v. Georgia 428 U.S. 153 (1976) and in Zant v. Stephens, supra, recognized the possibility that results as aberrant as this one were possible under the Georgia scheme but nonetheless upheld the statute since

> Appellate review in the Georgia capital sentencing scheme serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. Gregg v. Georgia, supra at 206.

---

record even if the judge had not charged in respect to the non-statutory circumstance. Stephens, supra at 4894.

Justice White, concurring, also saw no problem with the use of the non-statutory aggravating circumstance "since the evidence supporting the invalid aggravating circumstance was properly before the jury." Stephens, supra at 4899. Finally, Justice Rehnquist's concurrence sounded a similar theme.

Thus, all seven Justices who joined in the Court's judgement, expressed the opinion that the improper instruction had no significant impact on the jury's decision. This Court has since made clear that its conclusion in Zant v. Stephens rested on a harmless error analysis. Barclay v. Florida, 103 U.S. 3418, n. 8 at 3425 (1983).

[5/] In Moore v. State, the Georgia Court noted four mitigating circumstances that the sentencing judge did not consider. 233 Ga. at 865, 213 S.E. 2d at 832.

Appellate review did not cure the arbitrariness inherent in petitioner's sentence. Here, as in Godfrey v. Georgia, 446 U.S. 420 (1980) the statute, valid on its face, was applied in a constitutionally inadequate fashion. First, the Georgia Supreme Court failed to compare petitioner's case with the cases of similarly situated defendants. Second, petitioner was denied any access to or opportunity to make arguments about comparable cases in any Georgia forum. Third, the Circuit court erred in holding that the District court was barred from reviewing the record developed and considered by the Georgia Supreme court in order to resolve petitioner's Eighth Amendment challenge.

B. The Georgia Supreme Court Applied an Inadequate Test of Comparability

The Georgia Supreme court's comparability review[6/] violated petitioner's Eighth and Fourteenth Amendment rights in two ways. First it deemed petitioner's sentence comparable to death sentences imposed by juries in cases involving similar aggravating circumstances and thus, ignored the mandate of its own statute, as well as the Eighth Amendment to also compare petitioner's sentence to those sentences received by comparable defendants. And, second, even assuming arguendo that it chose the correct cases for comparison, those cases chosen provide no support whatsoever for the court's conclusion that petitioner's sentence was comparable. Indeed, the cases demonstrate precisely the opposite.

Comparability review represents the major device for controlling the arbitrary and capricious imposition of the death penalty in Georgia, Zant v. Stephens, supra. Georgia law provides the sentencer no guidance as to who shall die from among those who have committed capital crimes involving a valid aggravating circumstance. Zant v. Stephens, 103 S.Ct. at 2741-2. Georgia law neither lists relevant mitigating circumstances for the sentencer

6/ This case presents issues complementary to those presently before this Court in Pulley v. Harris, No. 82-1095. That case raises the question of (1) whether the Eighth Amendment requires appellate proportionality review and, (2) if so, "what is the constitutionally required focus, scope and procedural structure for such review?" 51 U.S.L.W. 3590 (2-15-83). This case involves the second of these questions in the context of statutorily mandated proportionality review under the Georgia statute. It provides an opportunity for this Court to clarify the obligations of both state and federal courts in the context of the highly influential Georgia model.

to consider nor insists upon jury instructions identifying those circumstances in the case under consideration. Redd v. State, 242 Ga. 876, 252 S.E. 2d 383 (1979). Georgia law imposes no requirement that a sentencer make findings regarding a particular individual and his suitability to die. Apparently, a defendant can be sentenced to death when a sentencer feels that a non-statutory circumstance -- e.g. the location of the killing -- compels it, regardless of any number of mitigating circumstances. Moore II at 1524.[7/]

Georgia compensates for the undefined discretion of the sentencer through mandatory appellate review requiring a finding that a sentence was not imposed under the influence of an arbitrary factor and that the sentence is proportional to other sentences, "considering both the crime and the defendant." OCGA 17-10-35 (1982). To facilitate this review, the statute creates the position of an assistant to the Supreme Court and authorizes the employment of staff. OCGA 17-10-37(a),(b)(1982). With regard to capital felony cases since 1970, the assistant has been charged with the responsibility of providing the Georgia Supreme court "with whatever extracted information it desires with respect thereto, including, but not limited to, a synopsis or brief of the facts in the record concerning the crime and the defendant." OCGA 17-10-37(a)(1982) (emphasis supplied).[8/] The court is required

[7/]This contrasts sharply with both the scheme employed in Texas and approved in Jurek v. Texas, 428 U.S. 262 (1976) which conditions death on a jury finding that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071(b)(2) V.A.C.C.P.; and with the Florida scheme, approved in Profitt v. Florida, 428 U.S. 242 (1976) which conditions death on a finding that the aggravating circumstances in a given case outweigh mitigating factors. Indeed, given the array of mitigating factors present here, petitioner could not have received death under other statutory schemes. See Warren v. State, 562 S.W.2d 474 (Tex.1978); Coleman v. State 378 So. 2d 640 (Miss. 1979).

[8/]To facilitate this review, the trial judge is required to prepare a report to the Georgia Supreme Court for every capital case. This report contains a list of seven mitigating factors with room to add additional ones. The factors are:

a. The defendant has no significant history of prior criminal activity.
b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
c. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
d. The murder was committed under circumstances

to identify in its opinion those cases which it considered for purposes of proportionality review. OCGA 17-10-35(e)(1982). In the event that it reverses a case on the grounds of disproportionality, the records of similar cases, as well as the extracts of these cases, prepared by the assistant to the court, are to be sent to the trial judge for his consideration. OCGA 17-10-35(e)(2)(1982). This procedure, properly conducted, is designed to eliminate the arbitrariness inherent in the uncontrolled exercise of discretion by Georgia sentencers. Zant v. Stephens, 103 S.Ct. at 2742.

On its face, the standard applied by the Georgia Supreme court in this case satisfied only one-half of its statutory mandate and none of its constitutional mandate to guard against the

arbitrary and capricious imposition of the death penalty. The court merely examined whether people who had committed crimes involving a statutory aggravating circumstance comparable to the circumstances in petitioner's case had sometimes received death. There was no comparison of whether defendants like Moore had ever received the death penalty.[9/] One can only receive the death penalty if there is evidence of an aggravating circumstance. The Georgia Supreme court only examined whether a death sentence sometimes was imposed on those who commit crimes involving a similar aggravating circumstance. This standard meant that every death sentence was necessarily comparable unless the legislature has totally misjudged the seriousness of a given aggravating circumstance. At an absolute minimum, it meant that there could be

---

which the defendant believed to provide a moral justification or extenuation for his conduct.

e. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

f. The defendant acted under duress or under the domination of another person.

g. At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

h. The youth of the defendant at the time of the crime.

i. Other.

9/ Even the most cursory examination of the allegedly comparable cases demonstrates that the Georgia court did not compare petitioner to similar defendants. Statement of the Case, supra.

no such thing as a disproportionate sentence if the defendant, like petitioner here, had been convicted of a felony murder.

Indeed, with the exception of one case involving co-defendants, Hall v. State, 241 Ga. 252, 244 S.E. 2d 833 (1978), and another involving re-sentencing of one defendant, Ward v. State, 239 Ga. 205, 236 S.E. 2d 365 (1975), the Georgia Supreme court has never reversed a death sentence on proportionality grounds. However, this Court in Gregg v. Georgia, supra, and Zant v. Stephens, supra did not pass on the constitutionality of a death statute with this kind of comparability review. Rather, it passed on the validity of the Georgia scheme as written. If the Georgia Supreme court did not apply the statute as it is written, then there was no practical difference between the pre-Furman and post-Furman Georgia death scheme as applied to a defendant like petitioner whose crime involved a valid statutory aggravating circumstance. Nothing in Zant v. Stephens or Gregg v. Georgia countenances such a result.

C. Petitioner Lacked Any Georgia Forum to Challenge the Comparability Analysis

In reviewing the petitioner's conviction, the Georgia Supreme court noted one aggravating circumstance and six mitigating circumstances. It then compared the petitioner's case with twenty-three other cases. Moore v. State, 233 Ga. at 865, 869 213 S.E. 2d at 833, 835. Of these twenty-three offenders, only nine received death sentences, and of those nine, none involved a single mitigating circumstance. Thus, when the District court examined this record, it concluded that (1) the Georgia Supreme court did not consider similar cases and (2) the imposition of this death sentence did "shock the conscience." Moore v. Balkcom, 513 F. Supp. 772, 816, 817 (S.D. Ga. 1981).

A total lack of due process engendered this egregious error. At the sentencing hearing the judge refused to consider evenhandedness, stating

> ...[The Georgia Supreme Court] will apply "evenhanded justice" to your case with other similar cases that have happened in Georgia. Now, I can't make that determination. The law does not place that discretion in me. It places that discretion solely within the jurisdiction of the Supreme Court of Georgia.

Sen. T. 55-56. The sentencing judge correctly stated Georgia law. Blake v. State, 239 Ga. 292, 236 S.E. 2d 637, cert. den. 434 U.S. 960 (1977).

The petitioner next sought the constitutionally mandated proportionality review before the Georgia Supreme Court. Georgia law made no provision for supplying this information to the petitioner so that he might have been heard on whether these cases did provide a proper basis for comparison. The petitioner, unaware of the cases which the Georgia Supreme court would utilize in conducting its review, tried, nonetheless, to call that court's attention to other comparable cases. That Court expressly denied him the right to do so. Moore v. State, supra 233 Ga. at 863-64, 213 S.E. 2d at 832.

Petitioner tried once again to raise this issue during his state habeas corpus proceeding, but was precluded again because Georgia law does not permit collateral attacks on the appropriateness of the procedure used in conducting proportionality review. Strozier v. Hopper, 234 Ga. 597, 598, 216 S.E. 2d 847, 849 (1975). Moore v. Hopper, Civ. Action No. 78-22, (Superior Ct., Tattnall Cty, July 13, 1978, p. 16.)

Thus, the Federal District court confronted a unique situation where both Georgia law and the United States Constitution demanded proportionality review but, under Georgia law, the finding of proportionality was made from an unchallengeable record in an unreviewable manner. Under these circumstances, the District Court felt compelled to examine the twenty-three cases. This review led the District Court to the conclusion that the petitioner's death sentence violated the Eighth and Fourteenth amendments since it "shocked the conscience" and could not be sustained under any constitutional application of the Georgia death penalty statute. Moore v. Balkcom, supra.[10/]

D. The Circuit Court of Appeals Barred Federal Habeas Review of

10/ The Federal District Court seeking to find similar cases that might have sustained the sentence then looked outside the record compiled by the Georgia Supreme Court. Since it found no such cases it set aside the petitioner's death sentence. Moore v. Balkcom, supra at 816. The District Court found no such cases because there were none. To the knowledge of the petitioner no such cases presently exist.

the Record before the Georgia Supreme Court.

In reversing, the Circuit court held

> A federal habeas court should not undertake a review of the state supreme court's proportionality review and, in effect, "get out the record" to see if the state court's findings of fact, their conclusion based on a review of similar cases, was supported by the "evidence" in the similar cases. To do so would thrust the federal judiciary into the substantive policy-making area of the state.

Moore II, at 1518. This holding constitutes clear error.

Since 1915, this court has held that the failure to provide petitioner with a "corrective process" enabling him to raise and litigate his constitutional claim justifies resort to federal habeas corpus. Frank v. Magnum, 237 U.S. 309 (1915). Beginning in 1953 a state prisoner has possessed the right to have a federal court in a habeas corpus proceeding consider the merits of his constitutional claim even though the matter has been fully litigated in the state court. Brown v. Allen, 344 U.S. 443 (1953)[11/]

The enactment of 28 U.S.C. §2254 in 1966 changed none of this. 28 U.S.C. §2241(c)(3) still continues to provide relief when the prisoner "is held in custody in violation of the Constitution...of the United States..."; and the new §2254(a) only limits federal habeas corpus review to those cases where

> [the applicant] is in custody in violation of the Constitution...of the United States.

Since the petitioner alleged a violation of his Eighth Amendment rights, 28 U.S.C. §2254 entitled the petitioner to have the District court review the entire record and pass on his

11/ The Court of Appeals relied on its precedent in Spinkellink v. Wainright, 578 F. 2d 582 (5th Cir.1978) cert. denied 440 U.S. 976 (1979). Moore II at 1517-18. However, Spinkellink dealt with the claim that a Federal District court should undertake its own proportionality review including a consideration of all cases ever decided in Florida rather than those which the Florida Supreme Court actually considered in deciding Spinkellink's appeal. Spinkellink's contention would have involved the federal courts in reviewing hundreds of cases and required them to continue reviewing new cases until either relief was granted or the petitioner was executed. Moreover, Florida law provides significant controls over the sentencer's discretion and the Florida statute neither expressly provides for nor creates procedures for comparability review. Georgia law is very different, since it provides little guidance to the sentencer, instead relying on proportionality review to prevent the "wanton and freakish imposition of the death penalty." Finally, in Spinkellink the court did, in fact, examine the cases which Spinkellink insisted demonstrated disproportionality. Spinkellink v. Wainright, supra, n. 25.

constitutional claim.

Section 2254(d) requires that the Federal District court on habeas corpus review presume the correctness of state court findings on factual issues. But the petitioner's Eighth Amendment claim raises no factual issues. No dispute exists. (1) Six mitigating circumstances favored the defendant. (2) None of the twenty-three cases used by the Georgia Supreme Court involved the imposition of the death sentence when a single mitigating factor favored the defendant. (3) The Georgia Supreme Court does not notify offenders as to which cases it will use for its proportionality review. And, (4) no Georgia court permitted the petitioner to argue that the cases chosen were not comparable. Thus the only issues presented to the Federal District court were the "ultimate question[s] as to (1) the constitutionality" of the procedures used in conducting the Georgia proportionality review and (2) whether the record of these flawed proceedings justified the imposition of the death penalty. These are either questions of law or "mixed question[s] of law and fact that [are] not governed by §2254." Sumner v. Mata, 455 U.S. 591, 597 (1982); see also, Jackson v. Virginia, 443 U.S. 307 (1979).

But even if this case did involve a question of fact the Federal District court still must examine the entire record. Sumner v. Mata, supra, involved a constitutional challenge to a photographic identification procedure. This Court has never suggested that federal habeas courts are barred from even looking at the identification evidence in order to address the merits of petitioner's claim.

> Of course, the federal courts are not necessarily bound by the state court's findings. Section 2254(d) permits a federal court to conclude, for example, that a state finding was "not fairly supported by the record."

Sumner v. Mata, supra at 597. But, how does one argue that a finding is "not fairly supported by the record" without looking at the record?

In apparent recognition of this totally unprecedented revision of twentieth century federal habeas corpus jurisprudence the Circuit court stated

> It is the state's responsibility to determine the procedure to be used, if any, in sentencing a

criminal to death.[12] See California v. Ramos, 103 S.Ct. at 3451-53.

Moore II at 1518.

If the Circuit court meant that the definition and application of comparability standards involves no federal question whatsoever, its decision conflicts with this Court's ruling in Godfrey v. Georgia, 446 U.S. 420 (1980). "This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Id. at 428 (emphasis supplied). In Godfrey this Court reviewed a Georgia death sentence imposed on the basis of a facially valid aggravating circumstance in order to determine whether the application of that circumstance to Godfrey's crime met Eighth Amendment standards. Here, the District court examined a facially valid comparability review to determine whether that review as applied had succeeded in eliminating the arbitrary and freakish imposition of the death penalty. This review was authorized by Godfrey v. Georgia, supra and by Jackson v. Virginia, 443 U.S. 307 (1979).

Even if this Court were to eliminate constitutionally mandated proportionality review, Georgia, by its own statute, must still accord the petitioner due process when conducting the mandated proportionality review. It cannot discard "all process" nor employ "any process." Georgia must give the petitioner "due process" as defined by the Fourteenth Amendment. Hicks v. Oklahoma, 447 U.S. 343, 346 (1980); Vitek v. Jones, 445 U.S. 480, 488-9 (1980); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979).

Had the Georgia Supreme Court sealed the petitioner's fate by a toss of the coin after finding that he commited a capital offense the petitioner would be entitled to federal habeas relief even though fifty percent of all defendants received life imprisonment. This court has

> repeatedly held that stare statutes may create liberty interests that are entitled to the

[12] Contrary to the understanding of the Circuit court, California v. Ramos does not support its holding. Indeed, this Court reaffirmed that the validity of the Georgia death statutes rests on "meaningful appellate review of each death sentence." California v. Ramos supra at 3452. This argument of the petitioner addresses itself solely to the procedural inadequacy of this constitutionally mandated appellate review.

procedural protections of the Due Process Clause of the Fourteenth Amendment.

Vitek v. Jones, supra at 488.

Thus, a defendant has no right to sentencing by a jury but once a state provides for such sentencing the defendant

> has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by jury in the exercise of its statutory discretion...and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State...

Hicks v. Oklahoma, supra at 346.

Since a prisoner has a right to a hearing protected by a panoply of due process guarantees when the state seeks to transfer him from a prison cell to a mental hospital bed, then, at a minimum, those same guarantees should apply when the state proposes to take him from his prison cell to the electric chair. Vitek v. Jones, supra. A convicted prisoner has no right to parole but once the state adopts a parole system it must provide the prisoner with a panoply of due process rights. Greenholtz v. Nebraska Penal Inmates, supra at 680-81. If a prisoner has a right to examine records bearing on his release from prison and to a hearing where he can contest records used by the parole board, it should follow that a prisoner facing execution has a right to notice of those cases that form the basis for concluding that his sentence was proportional and to an opportunity to explain why he thinks the cases chosen are not comparable.

Gardner v. Florida, 430 U.S. 349 (1977) supports this conclusion. Justice Stevens, writing for the plurality, rejected the argument that courts can be trusted to analyze sentencing data without the aid of counsel.

> "...the argument rests on the erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts. Our belief that debate between adversaries is often essential to the truth seeking function of trial requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases."

Gardner v. Florida, supra at 360 (opinion of Stevens, Stewart and Powell, JJ.)

III. A CONVICTION BASED UPON A PLEA TO A CAPITAL OFFENSE CANNOT STAND WHEN THE RECORD OF THE SENTENCING PROCEEDINGS DEMONSTRATES THAT THE OFFENDER DID NOT UNDERSTAND THE ELEMENTS OF THE CRIME.

Henderson v. Morgan, 426 U.S. 637 (1975) holds that a plea cannot be voluntary in the constitutional sense unless the defendant understands the charges to which he is pleading. Moreover, it is "error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." Boykin v. Alabama, 395 U.S. 238, 242 (1969).

To be guilty of malice murder, petitioner had either to intend to deliberately kill the victim or have killed with "an abandoned and malignant heart" where "no considerable provocation appears." Ga. Code Ann. 26-1101(a)(1978). Petitioner denied that he intended to kill Fredger Stapleton immediately after arrest, St. Ex. 27, 50, 52, to his attorney prior to pleading, S. Hab. T. 38, and in open court prior to being sentenced, Sen. T. 48. Although Moore was under oath, neither the sentencing judge nor the District Attorney asked him a single question to resolve the inconsistency between his statement and his plea.[13/]

His denial came at the end of plea and sentencing proceedings in which the judge had neither: (a) read the indictment; (b) nor accurately characterized the crime charged; (c) nor made any attempt to explain a single element of the crime charged to the defendant. Petitioner's plea, while perfectly consistent with the judge's description of the crime, -- that he did "kill one Fredger Stapleton with a certain pistol" (Arr. T. 1),-- was inconsistent with the crime that the grand jury had charged him with committing and for which he was convicted and sentenced to die.

The Constitution requires a knowing and intelligent plea. The record before the sentencing judge demonstrated just the opposite. It demonstrated that Moore did not understand the charge to which

13/ Under Georgia law, in order to be guilty of malice murder, one has to either intend to deliberately kill or to have killed with "an abandoned and malignant heart" where "no considerable provocation appears." Ga. Code Ann. 26-1101(a)(1978). Moreover, one cannot be convicted of intentional homicide when the evidence of intent is derived from the accused's statement and that statement admits to the killing, but "with the qualifying exclusion of the necessary ingredient of intent, and where there was nothing in the proofs submitted by the state which materially contradicted the defendant's account of what occured, even though the defendant's admission and his testimony may seem unreasonable. Harrell v. State 108 Ga. App. 295, 296, 132 S.E. 2d 787, 788 (1963).

he was pleading. Had this case arisen in federal court, McCarthy v. United States 394 U.S. 459 (1969) would demand reversal and repleading without reference to any collateral proceedings. The Seventh Circuit has applied the same rule to state court plea proceedings which affirmatively demonstrate that a defendant does not understand the elements of the crime to which he is pleading. Nash v. Israel 707 F. 2d 299 (7th Cir. 1983). However, the Eleventh Circuit court rejected the federal standard, as well as the approach of the Seventh Circuit. Instead, it erroneously upheld defendant's plea based on his trial lawyer's vague testimony at a state habeas proceeding held four years after his trial. Moore II at 1525-26.

The McCarthy rule must apply to this capital case for precisely the reason which led the Supreme Court to adopt it. Later efforts to reconstruct what the defendant understood "in this highly subjective area" are fraught with risk. As this Court has noted, even shifting to the government the burden of proof on the issue of knowledge would be of little value to the defendant. "No matter how true these allegations [that the defendant did not understand the charge] rarely, if ever, can a defendant corroborate them in a post plea voluntariness hearing." McCarthy v. United States, 394 U.S. at 469. Petitioner's conviction, like McCarthy's, cannot be sustained by subsequent findings because "...greater uncertainty is bound to exist since in the resolution of disputed contentions problems of credibility and reliability of memory cannot be avoided." McCarthy v. United States, id at 471 quoting Waddy v. Heer, 383 F 2d 789, 794 (6th Cir. 1967).

This case involves a plea to a death penalty which accentuates the need for the most reliable procedures. Zant v. Stephens, supra, 103 S.Ct. at 2747. A plea to a capital charge does more than waive constitutional rights. The defendant who pleads guilty foregoes the chance to avoid the death penalty by persuading the factfinder that he is not guilty of a capital crime. For this very reason, such pleas are rare. There have been but five such pleas in Georgia since 1974. When they do occur, however, the Eighth and Fourteenth Amendments demand an affirmative demonstration, on the

record of the sentencing proceedings, that the defendant, in fact, understood the charge to which he pled. When, as here, that record demonstrates a lack of understanding, the plea is void and cannot be saved by reference to vague testimony at a collateral proceeding held four years later when memories are dim and professional reputations may be at stake.

In the vast number of non-capital cases resolved by plea, the risk of an unreliable conviction may be tolerable because of considerations of comity and administrative convenience. Due process, in such cases, need not be the best practicable process. In the rare case of a plea to a capital crime, however, "the risk of an unwarranted conviction" must be held to an absolute minimum. The "far more important need" for individualized treatment in capital cases, recognized by Justice Burger in Lockett v. Ohio, supra, demands, as a matter of the Eighth and Fourteenth Amendments, the best practicable process. Mr. Moore was not afforded this and the defect cannot be cured by reference to collateral proceedings.

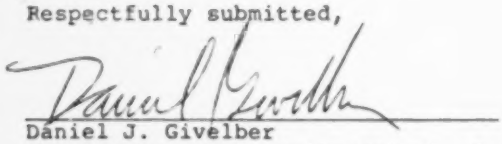
This conviction must be reversed.

CONCLUSION

For the reasons advanced above, the petition for certiorari should be granted and the decision below summarily reversed or, in the alternative, this case should be set down for briefing and argument.

Dated: January 12, 1984

Respectfully submitted,



Daniel J. Givelber
Northeastern University School of Law
400 Huntington Avenue
Boston, Massachusetts 02115
(617) 437-3943

COUNSEL OF RECORD

DANIEL J. GIVELBER
DONALD H. BERMAN
Northeastern University School of Law
400 Huntington Avenue
Boston, Massachusetts 02115
(617) 437-3943
(617) 437-3346

ATTORNEYS FOR PETITIONER

83-6084

APPENDIX A

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

No. 81-7418

D.C. Docket No. CV478-309

WILLIAM NEAL MOORE,

Respondent,
Cross-Petitioner,

versus

CHARLES BALKCOM, Warden,
ARTHUR K. BOLTON,
Attorney General,

Petitioners,
Cross-Respondents.

Appeals from the United States District Court for the
Southern District of Georgia

Before HILL and HENDERSON, Circuit Judges, and GARZA*, Senior Circuit Judge.

JUDGMENT ON REHEARING

This cause came on to be heard on petitioners' petition for rehearing;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the opinion and judgment originally entered by this Court is withdrawn; and the judgment of the said District Court appealed from is AFFIRMED IN PART and REVERSED IN PART.

September 30, 1983

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 81-7418

PUBLISH

WILLIAM NEAL MOORE,

Respondent,
Cross-Petitioner,

v.

CHARLES BALKCOM, Warden
ARTHUR K. BOLTON, Attorney General,

Petitioners,
Cross-Respondents.

Appeals from the United States District Court for the Southern District of Georgia

---

(December 13, 1983)
ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion September 30, 1983, 11th Cir., 1983, __F.2d__)

Before HILL and HENDERSON, Circuit Judges, and GARZA*, Senior Circuit Judge.

PER CURIAM:

* Honorable Reynaldo G. Garza, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

On petition for rehearing and suggestion for rehearing en banc, Respondent-Cross Petitioner William Neal Moore asserts that although the Supreme Court of Georgia considered all mitigating circumstances, the sentencing judge considered only Moore's having made true statements and having cooperated with officials. Moore also contends that the trial judge viewed the death sentence as mandatory in this case and did not understand that he possessed discretion to impose a life sentence.

In appraising these contentions, we have made a further complete review of the sentencing proceeding and add the following to Part III of our opinion:

> Judge McMillan properly considered all of the evidence in mitigation before exercising his discretion to impose death. The court listened carefully throughout the presentation of mitigation evidence, asking each witness questions,and concluding with each witness by asking whether he had anything further to say. Moore's relatives testified that Moore was a good boy who had never before been in any serious trouble. Moore testified at the sentencing hearing that he shot and killed the victim out of a combination of fright and intoxication. Then, the sentencing judge further noted as additional mitigating circumstances the fact of Moore's truthfulness and cooperation. Furthermore, Judge McMillan made it clear at the sentencing proceeding that he understood and accepted the mandate of Georgia law, as announced in Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974), that he had discretion in sentencing. We are satisfied that the court considered all of the evidence offered in mitigation before imposing death and are satisfied that the court understood that it possessed discretion to impose a life sentence.

With these additional observations, the petition for rehearing is

DENIED.

No member of this panel nor judge in regular service on the court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for rehearing en banc is

DENIED.

William Neal MOORE, Respondent, Cross-Petitioner,

v.

Charles BALKCOM, Warden, Arthur K. Bolton, Attorney General, Petitioners, Cross-Respondents.

No. 81-7418.

United States Court of Appeals, Eleventh Circuit.

Sept. 30, 1983.

The United States District Court for the Southern District of Georgia, B. Avant Edenfield, J., denied relief in habeas corpus except as to death sentence. An appeal and cross appeal were taken, and original decision thereon was reported, 709 F.2d 1353. On petition for rehearing and suggestion for rehearing en banc, the Court of Appeals, James C. Hill, Circuit Judge, held that: (1) it is state's responsibility to determine procedure to be used, if any, in sentencing criminal to death, and federal habeas court should not undertake review of state Supreme Court's proportionality review and, in effect, "get out the record" to see if state court's findings of fact, their conclusion based on review of similar cases, was supported by the "evidence" in the similar cases; (2) under Georgia law, once sentencing authority has determined exist-

ence of statutory aggravating circumstance, sentencing authority possesses unbridled discretion to determine, based on relevant and accurate information, whether to impose death sentence, and such discretion cannot be controlled; and (3) where Georgia state court judge in determining whether to impose capital punishment had found statutory aggravating circumstance, it was not improper for him to consider circumstance of particular case before him which was not prescribed in the statute.

Petition for rehearing granted; judgment affirmed except as to granting of relief from death sentence; opinion, 11 Cir., 709 F.2d 1353, withdrawn.

1. Homicide ⇐354

Finding that defendant had committed capital offense, malice murder, while in commission of another capital crime, armed robbery, was alone sufficient to support death sentence under Georgia law, and was supported by the record. O.C.G.A. §§ 16-5-1, 17-10-30(b)(2), (c), 17-10-35, 17-10-35(c).

2. Habeas Corpus ⇐90

Federal court in reviewing, in habeas corpus proceeding, Georgia court's proportionality review of death sentence would examine only whether Georgia Supreme Court had properly performed test assigned to it under the Georgia statutes, and would give great deference to Georgia Supreme Court's method of conducting its proportionality review. O.C.G.A. §§ 17-10-30(b), (b)(2), (c), 17-10-31, 17-10-35, 17-10-35(c).

3. Criminal Law ⇐1208.1(4)

It is for state government, as matter of state statutory law, subject to federal constitutional constraints, to decide whether to provide capital punishment mechanism and to provide for appropriate procedural safeguards, though federal habeas corpus court must and should examine whether application of approved sentencing procedures in particular case creates substantial risk that punishment has been inflicted in arbitrary and capricious manner. O.C.G.A. §§ 17-10-30(b), (b)(2), (c), 17-10-31, 17-10-35, 17-10-35(c); U.S.C.A. Const.Amend. 6.

4. Habeas Corpus ⇐90

It is state's responsibility to determine procedure to be used, if any, in sentencing criminal to death, and federal habeas court should not undertake review of state Supreme Court's proportionality review and, in effect, "get out the record" to see if state court's findings of fact, their conclusion based on review of similar cases, was supported by the "evidence" in the similar cases. O.C.G.A. §§ 17-10-30(b)(2), (c), 17-10-35, 17-10-35(c).

5. Habeas Corpus ⇐105

Federal district court habeas corpus review of state-imposed death sentence remains confined to whether state sentencing procedure both on its face and as applied violated Eighth and Fourteenth Amendments. U.S.C.A. Const.Amends. 8, 14.

6. Criminal Law ⇐1208.1(6)

Discretion need not be eliminated from capital punishment mechanisms, but, rather, the Supreme Court has focused on channeling discretion to minimize risk of arbitrary decision making. O.C.G.A. §§ 17-10-30(b)(2), (c), 17-10-35, 17-10-35(c); U.S.C.A. Const.Amends. 8, 14.

7. Criminal Law ⇐1208.1(4, 5)

Under Georgia law, sentencing authority possesses no discretion in either redefining crimes for which a defendant may be sentenced to death or adding to list of aggravating circumstances which make defendant eligible for such sentence, but once sentencing authority has determined existence of statutory aggravating circumstance, sentencing authority possesses unbridled discretion to determine, based on relevant and accurate information, whether to impose death sentence, and such discretion cannot be controlled. O.C.G.A. §§ 17-10-30(b)(2), (c), 17-10-35, 17-10-35(c); U.S.C.A. Const.Amends. 8, 14.

8. Criminal Law ⇐1208.1(5)

Under Georgia law, sentencing authority, in determining whether to impose death sentence, can assign what it deems appro-

priate weight to particular mitigating circumstances and, with unbridled consideration of mitigating circumstances, sentencing authority may consider something to be mitigating that others might consider aggravating, and different sentencing authorities can assign different weights to same aggravating circumstances, since Constitution does not assign specific weights to different aggravating or mitigating circumstances. O.C.G.A. §§ 17-10-30(b)(2), (c), 17-10-35, 17-10-35(c).

9. Criminal Law ⇐1147

Discretion exists in Georgia Supreme Court's review of capital cases, and court exercises discretion in determining whether death sentence was imposed under influence of passion, prejudice or other arbitrary factors and in selecting "similar cases" for its proportionality review. O.C.G.A. §§ 17-10-30(c), 17-10-35.

10. Criminal Law ⇐1208.1(5)

Where Georgia state court judge, in determining whether to impose capital punishment, had found statutory aggravating circumstance, it was not improper for him to consider circumstance of particular case before him which was not prescribed in the statute. O.C.G.A. § 17-10-2.

11. Criminal Law ⇐1208.1(5)

Where sentencing judge viewed statutory aggravating circumstances and location of murder and robbery as so aggravating crime as to outweigh all mitigating circumstances involved, such evaluation comported with constitutional requirement of individualized sentencing decision and since there was no refusal to consider mitigating circumstances, although nonstatutory aggravating circumstance was applied, there was no constitutional error. O.C.G.A. §§ 17-10-30, 17-10-30(b), (b)(2), (c), 17-10-31, 17-10-35, 17-10-35(a, c); U.S.C.A. Const.Amend. 6.

12. Habeas Corpus ⇐85.3(2)

Federal district court in habeas corpus proceeding properly used testimony received from petitioner and his counsel at state habeas proceeding in addressing issue whether plea was knowing and voluntary. 28 U.S.C.A. § 2254(d).

13. Criminal Law ⇐273.1(4)

State trial courts need not specifically address each individual element required under state statute in order to accept guilty plea but, rather, judge need only explain statute sufficiently to give defendant real and adequate notice of nature of charge against him or find proof that defendant in fact understood the charge. U.S.C.A. Const.Amend. 6.

14. Habeas Corpus ⇐90

District court in habeas corpus proceeding properly relied upon written factual determinations of state habeas corpus court after full evidentiary hearing in concluding that petitioner had been aware of his right to withdraw his plea and made reasoned decision not to do so, as against petitioner's own testimony that he had been unaware of such right. 28 U.S.C.A. § 2254(d).

15. Criminal Law ⇐641.13(7)

Decision by defendant and his counsel to seek relief on appeal rather than to withdraw plea represented strategic decision and, absent showing of exceptional circumstances, defendant was provided with effective assistance of counsel. U.S.C.A. Const. Amend. 6.

16. Criminal Law ⇐1088.12

Record which contained transcript of imposition of sentence which did not refer to any undisclosed aspect of proceeding on which there was reliance in imposition of sentence was sufficient, absent any showing that state of record was inadequate, to permit Georgia Supreme Court to perform its required review function.

17. Habeas Corpus ⇐56, 113(12)

In capital case the district court should be particularly favorably disposed toward habeas corpus petitioner's motion to amend, but granting or denial of leave to amend lies within discretion of trial court and is subject to reversal only for abuse. Fed. Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.; 28 U.S.C.A. § 2254(d).

16. Habeas Corpus ⇐56

Futility was proper ground upon which to deny proposed amendment of petition for habeas corpus relief. 28 U.S.C.A. § 2254(d).

Charles E. Brown, George M. Weaver, Atlanta, Ga., for petitioners, cross-respondents.

Professor Daniel J. Givelber, Northeastern University School of Law, Professor Donald Berman, Boston, Mass., for respondent, cross-petitioner.

Appeals from the United States District Court for the Southern District of Georgia.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 23, 1983, 11 Cir., 1983, 709 F.2d 1353)

Before HILL and HENDERSON, Circuit Judges, and GARZA*, Senior Circuit Judge.

JAMES C. HILL, Circuit Judge:

The petition for rehearing is granted. The prior panel opinion, issued June 23, 1983, is withdrawn and the following opinion is substituted in its place.

Petitioner, William Neal Moore, was convicted of malice murder and armed robbery in the Superior Court of Jefferson County, Georgia and sentenced to death. Both parties to this habeas corpus action raise numerous issues in this appeal and cross-appeal. We conclude that the district court correctly denied petitioner relief on his claims that he was unconstitutionally convicted on the basis of an unknowing plea to malice murder, that he was denied effective assistance of counsel, and that the failure to transcribe closing arguments deprived him of a constitutionally adequate review of his death sentence. In our prior opinion, we concluded that the trial court had committed constitutional error in imposing the death sentence on the basis of nonstatutory aggravating circumstances. In *Zant v. Stephens*, — U.S. —, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), the Supreme Court addressed the issue of whether a death penalty imposed under the Georgia death penalty scheme based on three statutory aggravating circumstances, one of which was subsequently held to be invalid by the Georgia Supreme Court, can be constitutionally upheld. The Court held that the narrowing function of statutory aggravating factors is achieved when the sentence is supported by at least one statutory aggravating circumstance. This decision controls, and is contrary to, our previous conclusion that the sentence must be vacated. Accordingly, we reverse the judgment of the district court on this issue.

I. *Procedural History*

A state grand jury indicted petitioner for the April 2, 1974 malice murder and armed robbery of Fredger Stapleton. At a hearing conducted by Judge Walter C. McMillan, Jr. on June 4, 1974, petitioner waived his right to a jury trial with respect to both guilt and sentence and entered a plea of guilty to all charges. At the sentencing hearing, Judge McMillan sentenced the petitioner to death.

The Georgia Supreme Court conducted its mandatory review of the death sentence in accordance with the Georgia statutory procedure. Ga.Code Ann. § 17-10-35 (1982) (formerly Ga.Code Ann. § 27-2537). The court affirmed petitioner's conviction and sentence in a *per curiam* opinion, with one judge dissenting, and denied Moore's petition for rehearing. *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975). The United States Supreme Court denied Moore's petition for certiorari. *Moore v. Georgia*, 428 U.S. 910, 96 S.Ct. 3222, 49 L.Ed.2d 1218 (1976).

Moore then filed a declaratory judgment action in state court seeking a new sentencing

* Honorable Reynaldo G. Garza, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

ing proceeding. The court denied relief and the Georgia Supreme Court affirmed. *Moore v. State*, 239 Ga. 67, 235 S.E.2d 519 (1977). The United States Supreme Court denied certiorari. *Moore v. Georgia*, 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 159 (1977). Moore then brought a habeas corpus in state court. The court denied all relief and the Georgia Supreme Court denied Moore's application for a certificate of probable cause to appeal.

Petitioner filed the present habeas corpus action on November 23, 1978 in the federal district court for the Southern District of Georgia. On April 29, 1981, the district court granted the writ with regard to petitioner's death sentence but denied relief on his other claims. This appeal and cross-appeal followed.

II. – Facts

At the time of Fredger Stapleton's death, Moore was an enlisted man in the United States Army. In connection with his military service, Moore met George Curtis, a nephew of Fredger Stapleton. Curtis told Moore that Mr. Stapleton kept a large sum of money at his home. At first, Moore and Curtis planned to rob the victim together and to set fire to the house with Stapleton inside. After entering Stapleton's house, Curtis and Moore found a locked door. Curtis became frightened and the two returned to Curtis' house. Subsequently Moore returned to Stapleton's house alone. However, he armed himself with a .38 caliber pistol in case he met opposition in his robbery attempt. Moore claims that he did not intend to kill Stapleton.

Moore claims that Stapleton confronted him with a shotgun. Stapleton fired a shotgun blast at Moore which missed. Stapleton then hit Moore in the leg with the gun barrel. Petitioner then fired four or five shots at Stapleton, who was hit and killed by two bullets which struck him in the chest.

After the shooting, Moore removed two billfolds from the victim's pockets and took the shotgun. The money taken from Stapleton totaled approximately $5700. Moore was subsequently arrested and cooperated with the police during the investigation.

III.

A. *Imposition of Sentence*

The district court, holding that the Georgia Supreme Court did not properly discharge its statutory duty of appellate review, concluded that the imposition of the death penalty in this case "shocks the conscience" and granted relief with regard to sentence. Under the Georgia system, the sentencing authority, either a judge or a jury, may impose the death sentence when it finds the existence of a statutory aggravating circumstance.[1] Ga.Code Ann. § 17–

1. Statutory aggravating circumstances include:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

10–31 (1982) (formerly Ga.Code Ann. § 26–3102). If the sentencing authority elects to impose the death penalty, it must specify the aggravating circumstance which it found beyond a reasonable doubt. Ga.Code Ann. § 17–10–30(c) (1982) (formerly Ga. Code Ann. § 27–2534.1(c). Whenever the death penalty is imposed, the Georgia Supreme Court must conduct an expedited review of the case. Ga.Code Ann. § 17–10–35 (1982) (formerly Ga.Code Ann. § 27–2537). In reviewing the sentence, the court must determine whether the sentence was imposed "under the influence of passion, prejudice, or any other arbitrary factor," whether the evidence supports the finding of a statutory aggravating circumstance, and "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Ga.Code Ann. § 17–10–35(c) (1982) (formerly Ga. Code Ann. § 27–2537(c)).

[1] In the case at bar, Judge McMillan sentenced Moore to death after finding that petitioner had committed a capital offense, malice murder, while in the commission of another capital crime, armed robbery. This finding was itself sufficient to support a death sentence under Georgia law and was supported by the record. *See* Ga.Code Ann. § 17–10–30(b)(2) (1982) (formerly Ga.Code Ann. § 27–2534.1(b)(2)). After reading his order and announcing the sentence which he imposed,[2] Judge McMillan continued:

> [F]or the purposes of this Court, for this finding, I could not in good conscience apply in your case sufficient to wipe out the aggravating statutory circumstances. If we're going to philosophy about it, and if I'm permitted to do that, I'll do it. People in their homes—the most precious place a man can have—is his home; and to be in a home, and probably this man was asleep, I don't know, or for any person to be, not this man, but any person, to be asleep in his home, to be invaded by an intruder, that's armed with weapons, that's prepared necessarily to kill (or otherwise the weapons wouldn't be there in the hands of the intruder), is probably an invasion of the highest injustice that another can do. Now, I can only imagine that anyone that is invaded by an intruder with an armed weapon, the fear that they must go through when they are encountered in such a situation. So I feel like that if the Court ever does require mandatory punishment—that is when they specify by law what offenses will have to be suffered by the electric chair—that one of these statutory offenses probably will be that when a person is robbed and killed in his home, that mandatory, as contrasted to discretionary, statutory aggravated circumstances will probably warrant the electric chair without life imprisonment. That justifies me in making the finding that I made.

In granting relief from the sentence, the district court found that the sentence was based primarily on the location of the killing, Stapleton's home, and not on the presence of the aggravating circumstance articulated in the trial judge's order. The district court concluded that the Georgia Supreme Court violated its statutory duty to review "similar cases" by focusing on cases involving different circumstances. In the district court's view, "similar cases" would be those involving killing in the home. The district court engaged in its own proportionality review on this basis and concluded that the death penalty in the case at bar "shocked the conscience."

B. *District Court's Analysis*

[2, 3] Judge Edenfield held that the death penalty was unconstitutionally imposed in this case after concluding that the Georgia Supreme Court erred in performing

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another. Ga.Code Ann. § 17–10–30(b) (1982) (formerly Ga.Code Ann. § 27–2534.1(b).

2. Judge McMillan made his comments after he had read his order which cites only one statutory aggravating circumstance as the basis for the sentence. He had not concluded the sentencing proceeding and his remarks should therefore be viewed as part of the proceedings.

its proportionality review. In upholding the constitutionality of the Georgia sentencing procedure, the United States Supreme Court noted the Georgia Supreme Court's mandatory review of all death sentences.[2] *Gregg v. Georgia*, 428 U.S. 153, 198, 203–06, 96 S.Ct. 2909, 2939–41, 49 L.Ed.2d 859 (1976) (Stewart, J., joined by Powell and Stevens, JJ.); *id.* at 211, 223–24, 96 S.Ct. at 2942–43, 2948–49 (White, J., joined by Burger, C.J., and Rehnquist, J., concurring); *see also Zant v. Stephens*, —— U.S. ——, 103 S.Ct. 2733, 2741–42, 2744, 2749–50, 77 L.Ed.2d 235 (1983). In reviewing the Georgia court's proportionality review, we examine only whether the Georgia Supreme Court has "properly perform[ed] the task assigned to it under the Georgia statutes." *Gregg v. Georgia*, 428 U.S. at 224, 96 S.Ct. at 2948 (White, J., joined by Burger, C.J., and Rehnquist, J., concurring); *see Zant v. Stephens*, 103 S.Ct. at 2744.

As a federal court reviewing a collateral attack on a state prosecution, we must give great deference to the Georgia Supreme Court's method of conducting its proportionality review. *See Barefoot v. Estelle*, —— U.S. ——, 103 S.Ct. 3383, 3391, 77 L.Ed.2d 1090 (1983). "The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Id.* It is the decision of the state government as a matter of state statutory law, subject to federal constitutional constraints, to decide whether or not to provide a capital punishment mechanism and to provide for appropriate procedural safeguards. *See California v. Ramos*, —— U.S. ——, 103 S.Ct. 3446, 3451–52, 77 L.Ed.2d 1171 (1983); *Zant v. Stephens*, 103 S.Ct. at 2743–44; *Eddings v. Oklahoma*, 455 U.S. 104, 127–28, 102 S.Ct. 869, 882–83, 71 L.Ed.2d 1 (1982) (Burger, C.J., joined by White, Blackmun, and Rehnquist, JJ., dissenting); *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980) (Stewart, J., joined by Blackmun, Powell and Stevens, JJ.) ("if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty"); *Wainwright v. Spenkelink*, 442 U.S. 901, 903, 99 S.Ct. 2421, 2422, 60 L.Ed.2d 1075 (1979) (Rehnquist, J., dissenting) ("a State whose citizens have expressed through their elected representatives and their judges and juries a will to impose the death penalty for offenses such as murder may do so if the State conforms its trial and sentencing procedures to the requirements enunciated in this Court's cases"); *Roberts v. Louisiana*, 428 U.S. 325, 337, 96 S.Ct. 3001, 3008, 49 L.Ed.2d 974 (1976) (White, J., joined by Burger, C.J., Blackmun and Rehnquist, JJ., dissenting). Federal habeas courts must and should examine whether the application of approved sentencing procedures in a particular case creates a substantial risk that the punishment has been inflicted in an arbitrary and capricious manner. *E.g., Enmund v. Florida*, —— U.S. ——, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Spinkellink v. Wainwright*, 578 F.2d 582, 604 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

This court concluded in *Spinkellink v. Wainwright* that a federal habeas court generally cannot reexamine the proportionality review performed by a state appellate court in a capital case. 578 F.2d at 604. Spinkellink had contended that his crime, when compared to other Florida death penalty cases, was insufficiently gruesome or heinous to warrant the death penalty, *id.* at 602, and had highlighted seven other cases in which the Florida Supreme Court had

2. We do not decide whether the Supreme Court has mandated that capital punishment may only be imposed where a state has provided for some type of proportionality review. *See Harris v. Pulley*, 692 F.2d 1189, 1196–97 (9th Cir. 1982), *cert. granted*, —— U.S. ——, 103 S.Ct. 1425, 75 L.Ed.2d 787 (1983) (No. 82–1095); *Williams v. Maggio*, 679 F.2d 381, 395 (5th Cir.1982) (en banc).

reversed death sentences. All of these other cases allegedly involved defendants equally or more deserving of the death penalty than he. *Id.* at 602 n. 25. This court condemned a federal case by case analysis of the cases used by the state appellate court in its proportionality review as an unnecessary intrusion on the Florida judicial system. *Id.* at 604.

> The process would be never-ending and the bench-mark for comparison would be chronically undefined. Further, there is no reason to believe that the federal judiciary can render better justice. . . . If the federal courts retried again and again the aggravating and mitigating circumstances in each of these cases, we may at times reach results different from those reached in the Florida state courts, but our conclusion would be no more, nor no less, accurate. Such is the human condition.

Id. at 605. The court qualified this doctrine of non-interference by noting that federal court intervention might be warranted if "a petitioner who has been sentenced to death can show that the facts and circumstance of his case are so clearly undeserving of capital punishment that to impose it would be patently unjust and would shock the conscience." *Id.* at 606 n. 28.

Petitioner argues that the review conducted by the Georgia Supreme Court in this case reached a result so extreme as to "shock the conscience." *Blake v. Zant*, 513 F.Supp. 772 at 812. Looking at Judge McMillan's comment, the district court concluded that he had based his sentencing decision on the fact that Moore had killed the victim in the victim's own home. The Georgia Supreme Court did not base its comparison of "similar cases" on cases involving victims who were attacked in their homes; it focused its review on cases involving the same statutory aggravating circumstance found in Judge McMillan's order. In the district court's view, the Georgia Supreme Court's analysis was improper since it chose the wrong cases to compare.[4] The district court concluded that the Georgia court's inadequate comparison justified the district court in engaging in its own proportionality analysis.

[4] We hold that the district court erred in conducting its own proportionality review. A federal habeas court should not undertake a review of the state supreme court's proportionality review and, in effect, "get out the record" to see if the state court's findings of fact, their conclusion based on a review of similar cases, was supported by the "evidence" in the similar cases. To do so would thrust the federal judiciary into the substantive policy making area of the state. It is the state's responsibility to determine the procedure to be used, if any, in sentencing a criminal to death. *See California v. Ramos*, 103 S.Ct. at 3451–53.

[5] The Georgia Supreme Court's proportionality review in this case provided an adequate safeguard against the freakish imposition of capital punishment.[5] *See*

4. In a sense, Moore's argument provides a significant basis for distinguishing *Spinkellink*. Spinkellink urged the court to compare the facts involved in other cases with those involved in his crime. Such a comparison, Spinkellink contended, would lead the federal court to conclude that application of the death penalty in his case was arbitrary, irrational, and capricious. Moore, on the other hand, does not challenge the result that the Georgia Supreme Court reached in its proportionality review. Moore seeks to establish that the Georgia Supreme Court "failed properly to perform its task in this case" of reviewing "similar cases." *See Gregg v. Georgia*, 428 U.S. at 224, 96 S.Ct. at 2948–49 (White, J., joined by Burger, C.J., and Rehnquist, J., concurring).

5. Different state supreme courts which have engaged in this type of proportionality review have suggested different methods of defining "similar cases." In *State v. Copeland*, S.C., 300 S.E.2d 63 (1982), the South Carolina Supreme Court defined the "universe" of similar cases as inclusive of all state cases in which the sentencing authority constitutionally imposed a death sentence based on similar findings of statutory aggravating circumstances. In *Williams v. Maggio*, 679 F.2d 381 (5th Cir.1982) (en banc), the court of appeals held that the Louisiana Supreme Court's review, a comparison of murder prosecutions in the particular judicial district from which the defendant appealed, provided adequate safeguards against freakish imposition of capital punishment. In *State v. Williams*, 308 N.C. 47, 301 S.E.2d 333,

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). While we may have reached a different conclusion regarding the proportionality of the sentence had we conducted a case-by-case comparison, we cannot conclude that the Georgia Supreme Court's review or the result it reached shocked the conscience.[6]

C. *Judge McMillan's Imposition of the Death Sentence*

In our original panel opinion, we concluded that the sentencing judge committed constitutional error by considering a nonstatutory aggravating factor in imposing the death penalty. *Moore v. Balkcom*, 709 F.2d 1353, 1361–67 (11th Cir.1983). In doing so, we had not had the opportunity to review the Supreme Court's holding in *Zant v. Stephens*, — U.S. —, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).[7] In that case, the Court squarely held that a death sentence imposed under the Georgia capital punishment scheme is not invalid when imposed partly on the basis of nonstatutory aggravating factors, provided that at least one valid statutory aggravating factor supports the sentence and that the invalid factor itself is not "constitutionally impermissible or totally irrelevant to the sentencing process." *Id.* at 2747. Judge McMillan based his sentencing decision partly on the valid statutory aggravating factor of murder committed in the course of another capital felony. *See* Ga.Code Ann. § 17–10–30(b)(2) (1982) (formerly Ga.Code Ann. § 27–2534.1(b)(2)). We therefore focus on the nature of the nonstatutory aggravating factor considered by Judge McMillan in imposing the death sentence.

The thrust of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1971), and its progeny has been that unbridled discretion in death penalty procedures leading to imposition of the sentence in a discriminatory, arbitrary, or capricious manner is unconstitutional. *See Zant v. Stephens*, 103 S.Ct. at 2746–47; *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204–05, 51 L.Ed.2d 393 (1977) (Stevens, J., joined by Stewart and Powell, JJ.); *Gregg v. Georgia*, 428 U.S. 153, 188–89, 96 S.Ct. 2909, 2932–33, 49 L.Ed.2d 859 (1976) (Stewart, J., joined by Powell and Stevens, JJ.) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action); *id.* at 199, 96 S.Ct. at 2937 (existence of discretionary stage does not invalidate Georgia procedure); *id.* at 220–23, 96 S.Ct. at 2947–48 (White, J., joined by Burger, C.J., and Rehnquist, J., concurring); *Proffitt v. Florida*, 428 U.S. 242, 252–54, 96 S.Ct. 2960, 2966–67, 49 L.Ed.2d 913 (1976) (Stewart, J., joined by Powell and Stevens, JJ.); *id.* at 258, 96 S.Ct. at 2969 ("the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness

355–57 (1983), the North Carolina Supreme Court held that similar cases for purposes of a proportionality review included "*all cases* arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by this Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time."

6. Even if we concluded that the Georgia Supreme Court's determination shocked the conscience, we would be required to remand the case to allow the state court to resentence the petitioner. A federal habeas court may not conduct a *de novo* proportionality review and thereby inject itself into the state sentencing procedure. Our review remains confined to whether the state sentencing procedure both on its face and as applied violates the eighth and fourteenth amendments. *See Spinkellink v. Wainwright*, 578 F.2d at 606 n. 28.

7. The Supreme Court rendered its decision in *Stephens* on June 22, 1983. We issued our original opinion in this case on June 23, 1983.

in its imposition"); *Jurek v. Texas*, 428 U.S. 262, 270–74, 96 S.Ct. 2950, 2955–57, 49 L.Ed.2d 929 (1976) (Stewart, J., joined by Powell and Stevens, JJ.) ("the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstance of the individual offense and the individual offender before it can impose a sentence of death").

[6] These and subsequent cases have emphasized that discretion need not be eliminated from capital punishment mechanisms; rather, the Supreme Court has focused on channeling discretion to minimize the risk of arbitrary decision making. *E.g., Eddings v. Oklahoma*, 455 U.S. 104, 110–15, 102 S.Ct. 869, 874–76, 71 L.Ed.2d 1 (1982); *Godfrey v. Georgia*, 446 U.S. 420, 427–28, 100 S.Ct. 1759, 1764–65, 64 L.Ed.2d 398 (1980) (Stewart, J., joined by Blackmun, Powell, and Stevens, JJ.); *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) (plurality opinion); *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204–05, 51 L.Ed.2d 393 (1977) (Stevens, J., joined by Stewart and Powell, JJ.), *Gregg v. Georgia*, 428 U.S. at 188–89, 96 S.Ct. at 2932–33 (Stewart, J., joined by Powell and Stevens, JJ.); *Proffitt v. Florida*, 428 U.S. at 258, 96 S.Ct. at 2969 (Stewart, J., joined by Powell and Stevens, JJ.); *Woodson v. North Carolina*, 428 U.S. 280, 302, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976) (Stewart, J., joined by Powell and Stevens, JJ.); *Furman v. Georgia*, 408 U.S. at 248–49 & n. 11, 92 S.Ct. at 2731–32 & n. 11 (Douglas, J., concurring); *id.* at 309–10, 92 S.Ct. at 2762–63 (Stewart, J., concurring); *id.* at 313, 92 S.Ct. at 2764 (White, J., concurring). *Furman* requires only that sentencing discretion "be 'directed and limited,' so that the death penalty [is] imposed in a more consistent and rational manner and so that there [is] a 'meaningful basis for distinguishing the . . . cases in which it is imposed from . . . the many cases in which it is not.'" *Lockett v. Ohio*, 438 U.S. at 601, 98 S.Ct. at 2963 (quoting *Gregg v. Georgia*, 428 U.S. at 188–89, 96 S.Ct. at 2932). In *Lockett*, the Court broadened the sentencing authority's discretion to allow consideration of all mitigating circumstances in making the individualized sentencing decision mandated by *Woodson* and *Roberts*.[8]

The Supreme Court's treatment of discretion in capital sentencing reflects an inherent tension between the requirement of individualized sentencing and objective standards. By approving the Georgia capital punishment procedure under which no person might be sentenced to death unless found guilty of a statutorily defined capital offense under circumstances specified by the legislature as aggravating the crime, the Court undertook to eliminate discretion (other than the inherent pardoning power of an American jury) in finding the defendant eligible for the death penalty. By denouncing mandatory death penalties in *Woodson* and requiring that the sentencing authority be free to consider *any* mitigating circumstances, statutory or not, in *Lockett*, the Court emphasized the importance of individualized consideration of each defendant and all circumstances in deciding whether or not to impose a sentence less than death. In *Zant v. Stephens*, — U.S.

8. Justice White, recognizing the arbitrary nature of any exercise of discretion, feared that allowing the sentencing authority to consider all mitigating circumstances would result in arbitrary and capricious death sentences.

> Moreover, I greatly fear that the effect of the Court's decision today will be to compel constitutionally a restoration of the state of affairs at the time *Furman* was decided, where the death penalty is imposed so erratically and the threat of execution is so attenuated for even the most atrocious murders that "its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." *Furman v. Georgia*, *supra* [408 U.S.], at 312 [92 S.Ct. at 2764] (White, J., concurring). By requiring as a matter of constitutional law that sentencing authorities be permitted to consider and in their discretion to act upon any and all mitigating circumstances the Court permits them to refuse to impose the death penalty no matter what the circumstances of the crime. This invites a return to the pre-*Furman* days when the death penalty was generally reserved for those very few for whom society has least consideration.

438 U.S. at 623, 98 S.Ct. at 2983.

——, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), the Supreme Court noted that "two themes guided the concern with eliminating arbitrariness in capital sentencing. First, the Court noted that no perfect procedure exists for deciding in which cases governmental authority should be used to impose death." *Id.* at 2747 (citing *Lockett v. Ohio*, 438 U.S. at 605, 98 S.Ct. at 2965 (plurality opinion)). Second, the Court recognized that "because there is a quantative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Id.* (citing *Woodson v. North Carolina*, 428 U.S. at 305, 96 S.Ct. at 2991 (Stewart, J., joined by Powell and Stevens, JJ.)). In determining whether Judge McMillan constitutionally imposed Moore's death sentence, we do not substitute our judgment on the sentence. Rather, we examine whether Judge McMillan properly examined the factors surrounding the crime, carefully considering all mitigating circumstances, before exercising his discretion in a properly channeled fashion in making the awesome sentencing decision in accordance with a constitutional capital punishment mechanism.

[7, 8] The Georgia death penalty system has channeled discretion to certain limited areas. *See generally Zant v. Stephens*, 250 Ga. 97, 297 S.E.2d 1 (1982). The defendant must have been accused and convicted of committing a crime for which the state allows imposition of the death penalty in accordance with the constitutional prohibition of cruel and unusual punishment. *See Coker v. Georgia*, 433 U.S. 584, 591–98, 97 S.Ct. 2861, 2865–69, 53 L.Ed.2d 982 (1977) (White, J., joined by Stewart, Blackmun, and Stevens, JJ.) (holding that though rape deserves serious punishment, the death penalty, which is unique in its severity and irreversibility, is an excessive penalty for the rapist who does not take a human life). In order *absolutely* to structure discretion while not requiring mandatory death sentences, Georgia has strictly limited the application of the death sentence to cases where the sentencing authority finds the existence of certain enumerated statutorily authorized aggravating circumstances. The sentencing authority possesses no discretion in either redefining the crimes for which a defendant may be sentenced to death or adding to the list of aggravating circumstances which make a defendant eligible for such sentence. Once the sentencing authority has determined the existence of a statutory aggravating circumstance, the defendant becomes eligible for a capital sentence. When this stage has been reached, the sentencing authority possesses unbridled discretion to determine, based on relevant and accurate information, whether to impose a death sentence.[9] This discretion cannot be controlled if the decision-maker is to make an individualized decision at this eligibility level. *See Eddings v. Oklahoma*, 455 U.S. at 123–28, 102 S.Ct. at 880–83 (Burger, C.J., joined by White, Blackmun, and Rehnquist, JJ., dissenting). The sentencing authority possesses unbridled discretion to consider any perceived mitigating circumstances. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). While discretion to impose the death penalty for any reason which might be capricious is denounced, *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1971), it now appears that discretion to grant mercy—perhaps capriciously—is not curtailed. The sentencing authority can assign what it deems the appropriate weight to particular mitigating

9. Unlike the Florida statutory system, the Georgia statutory mechanism does not explicitly require a weighing of aggravating circumstances against mitigating circumstances. *Goodwin v. Balkcom*, 684 F.2d 794, 801–02 (11th Cir.1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983). *Compare* Ga.Code Ann. § 17–10–31 (1982) (formerly Ga. Code Ann. § 26–3102) *with* Fla.Stat.Ann. §§ 921.141(2)(b) and (c). Both systems, however, require a subjective balancing by not automatically imposing the death sentence in cases where aggravating circumstances are found. Both systems require the sentencing authority to list specifically the statutory aggravating circumstances found in a particular case. *Id.*

circumstances. Moreover, with unbridled consideration of mitigating circumstances the sentencing authority may consider something to be mitigating that others might consider aggravating. Some might say that a stable family background is mitigating; others might reasonably say that this is an aggravating factor. Different sentencing authorities could assign different weights to the same aggravating circumstances. The constitution does not assign specific weights to different aggravating or mitigating circumstances.

In *Zant v. Stephens*, — U.S. —, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), the Supreme Court held that a sentencing authority does not arbitrarily impose the death penalty when, the statutory requirements having been met, it then considers nonstatutory aggravating circumstances. *See also Barclay v. Florida*, — U.S. —, 103 S.Ct. 3418, 3422–28, 77 L.Ed.2d 1134 (1983) (Rehnquist, J., joined by Burger, C.J., and White and O'Connor, JJ.). The Court noted that once the sentencing authority has found the existence of a statutory aggravating factor thereby making the defendant eligible for the death penalty, the Georgia scheme does not enunciate specific standards to guide the sentencing authority's consideration of aggravating and mitigating circumstances. *Id.* at 2741–42. In making its decision, the sentencing authority may consider

> additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas . . . .

Ga.Code Ann. § 17–10–2 (1982) (Formerly Ga.Code Ann. § 27–2503). The sentencer may not rely on misinformation of constitutional magnitude such as prior uncounseled convictions that were unconstitutionally imposed. *Zant v. Stephens*, 103 S.Ct. at 2748 n. 23. Similarly, the sentencer cannot apply as aggravating circumstances "factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant" or "conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness." *Id.* at 2747 (citations omitted). The sentencer also does not possess discretion to impose the death penalty based on nonstatutory aggravating circumstances which preclude the consideration of mitigating circumstances. *See Eddings v. Oklahoma*, 455 U.S. at 113–15, 102 S.Ct. at 875–76 ("[j]ust as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a *matter of law*, any relevant mitigating circumstances") (emphasis in original); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Reliance on any of these factors would invalidate the death sentence.

[9] Discretion exists in the Georgia Supreme Court's review of capital cases. The court exercises discretion in determining whether the death sentence was imposed under the influence of passion, prejudice, or other arbitrary factors and in selecting the "similar cases" for its proportionality review. *See* Ga.Code Ann. § 17–10–35 (1982) (formerly Ga.Code Ann. § 27–2537). Such discretion is necessary if the Georgia Supreme Court is to serve as a clearinghouse of all cases in which the death penalty has been imposed pursuant to the Georgia procedure and to ensure that the sentence has not been "freakishly" imposed. *See Godfrey v. Georgia*, 446 U.S. at 427, 100 S.Ct. at 1764 (Stewart, J., joined by Blackmun, Powell, Stevens, JJ.); *Gregg v. Georgia*, 428 U.S. at 188–89, 96 S.Ct. at 2932–33 (Stewart, J., joined by Powell & Stevens, JJ.).

In the case at bar, Judge McMillan, had the duty to examine the aggravating and mitigating circumstances. He considered both the commission of armed robbery and the location of the murder—the victim's home—in reaching his sentencing decision.[10]

10. He stated:

> [I]f the Court ever does require mandatory punishment—that is when they specify by

One might construe Judge McMillan's statement as both an explanation of why he viewed armed robbery in this case to be a sufficient reason to authorize and require him to impose the death penalty and a description of his thought process in evaluating the statutory aggravating factors.[11] Close examination of Judge McMillan's statement reveals, however, that he established a further and different nonstatutory aggravating circumstance of murder committed in the victim's home.

[10] Judge McMillan "justified" his sentence upon the weight he felt this circumstance deserved. This sentence was imposed in 1974, when many scholars anticipated that the channeling of discretion would lead to its elimination, so that certain crimes under certain circumstances would carry a mandatory death sentence. He predicted that this crime, "... when a person is robbed and killed in his own home ... would be such a crime." Although his prediction at that time was consistent with that of other scholars, later cases teach us that it was faulty. *Woodson v. North Carolina*, 428 U.S. at 302, 96 S.Ct. at 2990 (Stewart, J., joined by Powell and Stevens, JJ.) (mandatory statutes enacted in response to *Furman* have simply papered over the problem of unguided and unchecked jury discretion");[12] *Roberts v. Louisiana*, 428 U.S. 325, 334, 96 S.Ct. 3001, 3006, 49 L.Ed.2d 974 (1976) (Stewart, J., joined by Powell and Stevens, JJ.). He expressed his consideration of a circumstance of the particular case before him which was not prescribed in the statute. It being clear that he did find a statutory aggravating circumstance, *Stephens* teaches that this additional consideration, channelled to the nature of the particular crime, was not improper.

Our interpretation of Judge McMillan's statement as involving a nonstatutory circumstance is consistent with this court's decision in *Goode v. Wainwright*, 704 F.2d 593 (11th Cir.1983). In *Goode*, the trial judge, after the Florida jury had recommended death, listed three aggravating circumstances and two mitigating circumstances and stated that the mitigating circumstances did not outweigh the aggravating circumstances. *Id.* at 604. He justified his sentencing of Goode to death by stating that "there are certain cases and certain times when we can no longer help, we can no longer rehabilitate, and there are certain people, and Arthur Goode is one of them, that's actions demand that society respond and all we can do is exterminate." *Id.* He concluded that a death sentence would "guarantee society, at least as far as it relates to this man, ... that he will never again kill, maim, torture, or harm another human being." *Id.* The court of appeals

law what offense will have to be suffered by the electric chair—that one of these statutory offenses probably will be that when a person is robbed and killed in his home, that mandatory, as contrasted to discretionary, statutory aggravated circumstances will probably warrant the electric chair without life imprisonment. That justifies me in making the finding that I made.

11. Under the Georgia capital punishment system, the sentencing authority which imposes a death sentence must specify the aggravating circumstance(s) found. Ga.Code Ann. § 17-10-30(c) (1982) (formerly Ga.Code Ann. § 27-2534.1(c)). The trial court must also transmit a transcript and complete record of the trial as well as a separate report by the trial judge to the Georgia Supreme Court. Ga.Code Ann. § 17-10-35(a) (1982) (formerly Ga.Code Ann. § 27-2537(a)). This report is in the form of a 6½ page questionnaire designed to elicit information about the defendant, the crime, and the circumstances of the trial. The report includes responses to detailed questions concerning the quality of the defendant's representation, whether race played a role in the trial, and whether in the trial judge's judgment, there was any doubt about the defendant's guilt or the appropriateness of the sentence. *Id.*

In his report, Judge McMillan listed the advance planning of Moore to commit the crime as a non-statutory circumstance which played a role in his decision. In imposing sentence in court, however, Judge McMillan clearly relied on the murder's location as another aggravating factor on the level of the statutorily enumerated factors in "justifying" his sentence.

12. Justice Stewart's opinion implies that mandatory death penalty statutes applied to an extremely narrow category of crimes defined in large part in terms of the offender's character or record may be constitutionally permissible. *Id.* 428 U.S. at 287 nn. 7 and 8, 292 n. 25, 96 S.Ct. at 2983 nn. 7 and 8, 2985 n. 25.

concluded that these statements indicated that the trial judge had improperly relied on a nonstatutory aggravating circumstance—impossibility of rehabilitation—and granted habeas relief. As the Court found in *Goode* upon examining the trial judge's statement, we conclude that Judge McMillan justified his sentence, statutory eligibility having been established, on a nonstatutory aggravating factor.[13]

Since consideration of a nonstatutory aggravating factor does not automatically invalidate a death sentence, *Barclay v. Florida*, —— U.S. ——, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); *Zant v. Stephens*, —— U.S. ——, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), we must determine whether the factor applied in this case violated the constitution. Moore asserts that Judge McMillan viewed the location of the murder, the victim's home, as precluding, as a matter of law, consideration of any relevant mitigating circumstances. *See Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). In *Eddings* the trial judge stated: "Nor can the court in following the law, in my opinion, consider the fact of this young man's violent background." *Id.* at 109, 102 S.Ct. at 873. The Supreme Court emphasized that though the Oklahoma Court of Criminal Appeals agreed with the trial court that "only the fact of Edding's youth was properly considered as a mitigating circumstance." *Id.*

The case at bar presents a substantially different situation. Judge McMillan stated that in his view in 1974 murder and robbery in the home would, ultimately, require "mandatory . . . . statutory aggravated circumstances" if the Supreme Court ever required mandatory capital punishment. He also stated, however, that:

> I also found, but I didn't need to find . . . . mitigating circumstances insofar as the aggravating circumstances were concerned. Mitigating means good circumstances, those being your willingness and your forthrightness in meeting what must be to you a terrible, terrible experience. So that does go to your credit, but for the purposes of this Court, for this finding, I could not in good conscience apply in your case sufficient [mitigating circumstances] to wipe out the aggravating statutory circumstances.

In affirming the trial judge's decision, the Georgia Supreme Court noted that Judge McMillan had found as mitigating circumstances that Moore had done "the honorable thing in making true statements, cooperating with the officials and pleading guilty." *Moore v. State*, 233 Ga. at 865, 213 S.E.2d at 832. In conducting its proportionality review and affirming the sentence, the court also noted that Moore asserted that he had fully cooperated with the police, was 23 years old, was not an experienced criminal, and had started shooting from a combination of fright and intoxication. *Id.*

[11] One could interpret Judge McMillan's language that capital punishment would likely become mandatory in cases involving murder and robbery in the victim's home as a nonstatutory aggravating factor which precluded consideration of mitigating factors. A fair examination of the entire sentencing proceeding, however, does not support this interpretation. The record indicates that Judge McMillan viewed the statutory aggravating circumstances and the location of the murder and robbery as so aggravating the crime as to outweigh all mitigating circumstances involved in the case. Such an evaluation comports with the constitutional requirement of an individualized sentencing decision. *See Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983) (*en banc*). This interpretation rests, in part, on the analysis used by the Georgia Supreme Court in conducting its mandatory proportionality review. *See Zant v. Stephens*, 103 S.Ct. at 2749–50.

13. We need not comment on whether murder committed in the home would be a proper aggravating circumstance because Georgia has never included this factor as a statutory aggravating circumstance in Ga.Code Ann. § 17–10–30 (1982) (formerly Ga.Code Ann. § 27–2534.1). *See also California v. Ramos*, 103 S.Ct. at 3452–53.

We conclude that though Judge McMillan applied a nonstatutory aggravating circumstance in imposing sentence, he did not refuse to consider mitigating circumstances. We therefore hold that the sentencing judge did not commit constitutional error in imposing petitioner's sentence.

IV. *Validity of Petitioner's Plea*

In his cross-appeal, petitioner attacks the validity of his guilty plea, alleging that it was not intelligently and knowingly made. In *Henderson v. Morgan*, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976), the Supreme Court held that a guilty plea is voluntarily made when the accused understands the nature of the constitutional protections he is waiving and he completely understands the charge. *Id.* at 645 n. 13, 96 S.Ct. at 2257 n. 13. "Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary [as an intelligent admission of guilt]." *Id.*

Moore argues that he did not understand the elements of malice murder and that the record before the sentencing judge demonstrates Moore's lack of understanding. Petitioner notes that the trial judge never explained the terms "malice aforethought," "intention," "provocation," or "abandoned and malignant heart." Moore asserts that he did not intend to kill Mr. Stapleton and specifically denied such intent on numerous occasions. Petitioner argues that we must determine his understanding by referring only to the record before the sentencing judge.

Petitioner admitted that he was in fact guilty of the offense charged in the indictment. At the entry of his guilty plea and during the sentencing proceeding, Moore acknowledged that he had authorized his counsel, Mr. Pierce, to enter a plea of guilty. Petitioner indicated that he understood the court's inquiries, that he had not entered his plea as a result of threats, coercion, or promises of benefit, and that he had conferred with his attorney concerning the charges against him and the questions posed to him by the court. The question before this panel is therefore whether Moore was given sufficient notice of the nature of the charges facing him in order to understand the crime.

[12] As a preliminary matter, we hold that the district court properly used the testimony received from petitioner and Mr. Pierce at the state habeas proceeding in addressing this issue. "Evidence obtained at a post-conviction proceeding may serve to supplement the trial transcript and may be used in determining whether a plea was voluntarily made." *Pollinzi v. Estelle*, 628 F.2d 417, 418 (5th Cir.1980); *Fisher v. Wainwright*, 584 F.2d 691, 693 (5th Cir. 1978). At this proceeding, Mr. Pierce testified that he had explained the elements of the crime[14] to Moore and the requirement of a finding of aggravating circumstances in order to impose the death penalty. Petitioner has failed to overcome the presumption of correctness which attaches to the state habeas court's findings of fact. *See* 28 U.S.C. § 2254(d) (1976).

[13] Petitioner relies heavily on the trial court's failure to address individually the particular elements of the crime charged when accepting the plea. State trial courts need not specifically address each individual element required under a state statute in order to accept a guilty plea. *See Burden v. State of Alabama*, 584 F.2d 100, 102 (5th Cir.1978) (record must contain some evidence that defendant was informed of elements of crime or some representation by counsel concerning the information which the defendant received). The judge need

14. Ga.Code Ann. § 16-5-1 (1982) (formerly Ga. Code Ann. § 26-1101) which defines the crime of malice murder provides:

(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

(b) Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

only explain the statute sufficiently to give the defendant real and adequate notice of the nature of the charge against him or find proof that the defendant in fact understood the charge. *Henderson v. Morgan*, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976). In the case at bar, both the petitioner's answers to questions posed in open court and testimony from his attorney support the conclusion that he in fact understood the nature of the charges against him.

V. *Awareness of Right to Withdraw Guilty Plea*

[14] Petitioner contends that he was not made aware of his right to withdraw his guilty plea at any time prior to the filing of his sentence. He contends that had he been aware of this right, he would have withdrawn his plea. Both the federal and state habeas courts found that Moore was aware of this right. Mr. Pierce specifically recalled advising petitioner of this right. Counsel also explained that petitioner had decided, upon his recommendation, not to withdraw the plea even if a death sentence were imposed. Petitioner relies solely on his own testimony that he was unaware of this right. We conclude that the district court properly relied upon the written factual determinations of the state habeas court after a full evidentiary hearing in concluding that Moore was aware of his right to withdraw his plea and made a reasoned decision not to do so. *Grantling v. Balkcom*, 632 F.2d 1261 (5th Cir.1980).

[15] Counsel's and petitioner's decision to seek relief on appeal rather than withdrawing the plea represented a strategic decision. *See Washington v. Strickland*, 693 F.2d 1243, 1253–54 (5th Cir. Unit B 1982) (en banc), *cert. granted*, —— U.S. ——, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). Questions of trial strategy or tactics, particularly when consented to by the defendant, do not constitute a basis for federal habeas relief in the absence of exceptional circumstances. *See Coco v. United States*, 569 F.2d 367 (5th Cir.1978). Since petitioner has failed to show such exceptional circumstances, we hold that petitioner was provided with effective assistance of counsel.

VI. *Absence of Transcript of Closing Argument*

[16] Petitioner also argues that the trial court's failure to transcribe the closing arguments at his sentencing hearing prevented the reviewing courts from examining the imposition of his death sentence with "full disclosure of the basis for the death sentence." *Gardner v. Florida*, 430 U.S. 349, 361, 97 S.Ct. 1197, 1206, 51 L.Ed.2d 393 (1977) (Stevens, J., joined by Stewart and Powell, JJ.). The Court in *Gardner*, however, mandated only that "the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed." *Id.* In *Gardner*, the trial judge based his sentence in part on information contained in a partially disclosed presentence investigation report. In the case at bar, the record contains the transcript of Judge McMillan's imposition of sentence which does not refer to any undisclosed aspect of the proceeding on which he relied in imposing sentence. Moore has not shown that the state of the record was inadequate to permit the Georgia Supreme Court to perform its required review function. *See Stephens v. Zant*, 631 F.2d 397, 402–04 (5th Cir.1980), *modified on other grounds*, 648 F.2d 446 (5th Cir.1981), *rev'd on other grounds*, —— U.S. ——, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

VII. *District Court's Denial of Petitioner's Motion to Amend*

[17] Moore contends that the district court erred in refusing to allow him to amend his habeas petition. Federal Rule of Civil Procedure 15(a) provides that a party may amend his pleading after a responsive pleading has been served only by leave of court. The rule also states that "leave shall be freely given when justice so requires." Certainly in a capital case, the district court should be particularly favorably disposed toward a petitioner's motion to amend. Nevertheless, the granting or denial of

leave to amend lies within the discretion of the trial court and is subject to reversal only for abuse of discretion. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); *Barrett v. Independent Order of Foresters*, 625 F.2d 73, 75 (5th Cir.1980); *In re Westec*, 434 F.2d 195, 203–04 (5th Cir.1970). In *Foman*, the Supreme Court held that the district court had abused its discretion when it denied leave to amend for no apparent or declared reason "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc." *Foman*, 371 U.S. at 182, 83 S.Ct. at 230. In *Barrett*, the court of appeals held that the trial judge had not abused his discretion where the proposed amendment was not filed until nearly ten months after the original complaint and the appellant failed to show why the proposed additional matters could not have been raised initially. *Barrett*, 625 F.2d at 75.

[18] In the case at bar, the district court articulated sufficient reasons within its discretion justifying its decision denying leave to amend. Moore sought to assert that the Georgia capital sentencing procedure violated the eighth and fourteenth amendments despite the Supreme Court's prior holding that the Georgia death penalty statute is on its face constitutional. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The district court therefore refused to allow this proposed amendment on grounds of futility. *Blake v. Zant*, 513 F.Supp. 772, 805 (S.D.Ga.1981). Moore also claims that the district judge should have allowed him to amend his petition to allege that Judge McMillan unconstitutionally used a presentence report in imposing sentence before the petitioner or his counsel had an opportunity to examine it. The district court found that petitioner had been represented by counsel at all times. Counsel explicitly referred to this issue in the original habeas petition filed approximately two years before the proposed amendment. We cannot say that the district court abused its discretion in denying the proposed amendment in this case where counsel apparently considered and rejected the proposed arguments two years before filing the proposed amendment.[15]

Conclusion

We GRANT the Petition for Rehearing. We affirm the district court's judgment that Moore's plea was voluntarily, intelligently, and knowingly made, that petitioner was aware of his right to withdraw his guilty plea, and that the absence of a transcript of closing arguments did not prevent adequate appellate review. We hold that the district court acted within its discretion in denying Moore's motion to amend his petition. We reverse the district court's judgment granting relief from petitioner's death sentence.

No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

AFFIRMED in part and REVERSED in part.

15. Mr. James C. Bonner who had represented petitioner at the prior state habeas petition, filed the initial habeas petition in federal court. At the time the proposed amendment was filed, Ms. H. Diana Hicks represented Moore. Since Moore was represented at all times by counsel, though not by the same individual, we cannot say that the district court abused its discretion in refusing to allow the amendment. Had the original petition been filed without counsel, we would be presented with a different situation on which we need not pass at this time.

APPENDIX B

William Neal MOORE, Respondent-Cross Petitioner,

v.

Charles BALKCOM, Warden, Arthur K. Bolton, Attorney General, Petitioners-Cross Respondents.

No. 81-7418.

United States Court of Appeals, Eleventh Circuit.

June 23, 1983.

Georgia capital penalty defendant sought habeas corpus. The United States

1. Rule 26(F) of our Local Rules provides that, "A suggestion for rehearing en banc will also be treated as a petition for rehearing before the original panel."

District Court for the Southern District of Georgia, B. Avant Edenfield, J., granted writ with regard to death sentence, and appeal and cross appeal were taken. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) district court erred in conducting a de novo proportionality review of death sentence; (2) Georgia trial court committed constitutional error in imposing death sentence on basis of nonstatutory aggravating circumstance, i.e., that murder occurred in victim's home; and (3) relief was properly denied on claims of denial of effective assistance of counsel, failure to transcribe closing argument and lack of understanding of elements of the offense.

Affirmed and remanded.

Garza, Circuit Judge, sitting by designation, concurred specially with opinion.

1. Criminal Law ⇐956(1), 957(2)

Generally, postproceeding testimony by the trial judge or juror about his mental processes in reaching a decision may not be used as evidence in a subsequent challenge to the decision.

2. Habeas Corpus ⇐90

Federal court reviewing a collateral attack on a state prosecution must give great deference to the state Supreme Court's method of conducting its proportionality review in a death penalty case. 28 U.S.C.A. § 2254.

3. Criminal Law ⇐13(2)

It is the decision of the state government as a matter of state statutory law, subject to federal constitutional constraints, to decide whether to provide a capital punishment mechanism and to provide for appropriate procedural safeguards.

4. Habeas Corpus ⇐92(1)

Federal habeas courts must and should examine whether application of approved sentencing procedures in a particular case creates a substantial risk that the death penalty has been inflicted in an arbitrary and capricious manner.

5. Habeas Corpus ⇐92(1)

Although Court of Appeals may have reached a different conclusion regarding proportionality of charge of death penalty had it conducted a case-by-case comparison, the district court, on habeas corpus, erred in conducting its own proportionality review as it could not be said that the Georgia Supreme Court's review or result it reached shocked the conscience and the state's proportionality review provided the adequate safeguards against freakish imposition of capital punishment. O.C.G.A. § 17-10-35; U.S.C.A. Const.Amends. 8, 14.

6. Habeas Corpus ⇐92(1)

A federal habeas court should not undertake a review of a state Supreme Court's proportionality review in a death penalty case and, in effect, get out the record and see if the state court's fact findings, and conclusions based on review of similar cases was supported by the "evidence" in the similar cases.

7. Criminal Law ⇐1208(1)

It is the state's responsibility to determine the procedure used, if any, in sentencing a criminal to death.

8. Habeas Corpus ⇐112

Even if federal habeas court concluded that Georgia Supreme Court's proportionality determination in death penalty case shocked the conscience, remand for resentencing would be the appropriate remedy and federal court could not conduct a de novo proportionality review. O.C.G.A. § 17-10-35; U.S.C.A. Const.Amends. 8, 14.

9. Habeas Corpus ⇐92(1)

Federal habeas review in capital penalty cases is confined to whether the state sentencing procedure both on its face and as applied violates the Eighth and Fourteenth Amendments. U.S.C.A. Const. Amends. 8, 14.

10. Habeas Corpus ⇐92(1)

Federal habeas review of death penalty determinations focuses on discretion both available to and exercised by the sentencing authority. U.S.C.A. Const.Amends. 8, 14.

11. Criminal Law ⇐1206(1)

Unbridled discretion in death penalty procedures, leading to imposition of the sentence in discriminatory, arbitrary, or capricious manner is unconstitutional. U.S.C.A. Const.Amends. 8, 14.

12. Homicide ⇐354

Georgia trial court's considering both commission of armed robbery and location of murder, i.e., victim's home, in reaching capital penalty decision would not violate the Constitution in view of requirement of individualized sentencing process if limited to an explanation as to why the court viewed the armed robbery as authorizing the death penalty and as a description of the thought process in evaluating the statutory aggravating factors, but it was constitutional error to view death penalty as mandatory because murder occurred in the victim's house, thereby eliminating consideration of valid mitigating circumstances. O.C.G.A. § 17-10-30(b)(2); U.S.C.A. Const. Amends. 8, 14.

13. Criminal Law ⇐1208(1)

Eligibility for death sentence cannot be arbitrarily determined and the sentencing authority can determine eligibility only by finding existence of guilt of a capital offense and existence of statutory aggravating circumstances and imposition of death penalty on basis of nonstatutory aggravating circumstance represents a unique freakish instance in violation of *Furman*. U.S.C.A. Const.Amends. 8, 14.

14. Habeas Corpus ⇐90

Federal habeas court properly used testimony received from petitioner and his counsel at state habeas proceeding in addressing issue of whether plea was knowing and intelligently made, as against contention that petitioner did not understand elements of malice murder. 28 U.S.C.A. § 2254.

15. Criminal Law ⇐273.1(4)

State trial courts need not specifically address each individual element required under a state statute before guilty plea is constitutionally valid, and the judge need only explain the statute sufficiently to give the accused real and adequate notice of nature of the charge against him or find proof that accused in fact understood the charge.

16. Habeas Corpus ⇐90

District court properly relied on written factual determinations of state habeas court after a full evidentiary hearing in concluding that state petitioner was aware of right to withdraw guilty plea and made a reasoned decision not to do so and that counsel and petitioner's decision to seek relief on appeal rather than withdrawing plea was a strategic decision.

17. Habeas Corpus ⇐25.1(6)

Questions of trial strategy or tactics, particularly when consented to by the petitioner, do not constitute a basis for federal habeas relief, on ground of effective assistance of counsel, absent exceptional circumstances.

18. Habeas Corpus ⇐55

In a capital case, the district court should be particularly favorably disposed toward a state petitioner's motion to amend a habeas corpus petition, but granting or denial of leave to amend is within the discretion of the trial court and is subject to reversal only for abuse. Fed.Rules Civ. Proc.Rule 15(a), 28 U.S.C.A.

19. Habeas Corpus ⇐55

It was not abuse of discretion to deny leave to amend habeas petition to assert that Georgia capital sentencing procedure violated Eighth and Fourteenth Amendments despite Supreme Court's prior holding to the contrary or allege that state trial judge unconstitutionally used presentence report in imposing sentence before petitioner or his counsel had opportunity to examine it where counsel explicitly referred to the issue in the original habeas petition filed approximately two years before the proposed amendment. Fed.Rules Civ.Proc. Rule 15(a), 28 U.S.C.A.

Charles E. Brown, Asst. Atty. Gen., George M. Weaver, Asst. Sol., Atlanta, Ga., for petitioners-cross respondents.

Professor Daniel J. Givelber, Professor Donald Berman, Northeastern University School of Law, Boston, Mass., for respondent-cross petitioner.

Appeals from the United States District Court for the Southern District of Georgia.

Before HILL and HENDERSON, Circuit Judges, and GARZA*, Senior Circuit Judge.

JAMES C. HILL, Circuit Judge:

The petitioner, William Neal Moore, was convicted of malice murder and armed robbery in the Superior Court of Jefferson County, Georgia and sentenced to death. Both parties to this habeas corpus action raise numerous issues in this appeal and cross-appeal. We conclude that the district court correctly denied petitioner relief on his claims that he was unconstitutionally convicted on the basis of an unknowing plea to malice murder, that he was denied effective assistance of counsel, and that the failure to transcribe closing arguments deprived him of a constitutionally adequate review of his death sentence. We hold that the district court erred in conducting a *de novo* proportionality review of the petitioner's death sentence. We conclude that the trial court committed constitutional error in imposing the death sentence on the basis of non-statutory aggravating circumstances. Accordingly, we affirm the judgment of the district court and remand the case for further proceedings.

I. *Procedural History*

A state grand jury indicted petitioner for the April 2, 1974 malice murder and armed robbery of Fredger Stapleton. At a hearing conducted by Judge Walter C. McMillan, Jr. on June 4, 1974, petitioner waived his right to a jury trial with respect to both guilt and sentence and entered a plea of guilty to all charges. At the sentencing hearing, Judge McMillan sentenced the petitioner to death.

The Georgia Supreme Court conducted its mandatory review of the death sentence in accordance with the Georgia statutory procedure. Ga.Code Ann. § 17-10-35 (1982) (formerly Ga.Code Ann. § 27-2537). The court affirmed petitioner's conviction and sentence in a *per curiam* opinion, with one judge dissenting, and denied Moore's petition for rehearing. *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975). The United States Supreme Court denied Moore's petition for certiorari. *Moore v. Georgia*, 423 U.S. 910, 96 S.Ct. 3222, 49 L.Ed.2d 1218 (1976).

Moore then filed a declaratory judgment action in state court seeking a new sentencing proceeding. The court denied relief and the Georgia Supreme Court affirmed. *Moore v. State*, 239 Ga. 67, 235 S.E.2d 519 (1977). The United States Supreme Court denied certiorari. *Moore v. Georgia*, 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 159 (1977). Moore then brought a habeas corpus action in state court. The court denied all relief and the Georgia Supreme Court denied Moore's application for a certificate of probable cause to appeal.

The petitioner filed the present habeas corpus action on November 23, 1978 in the federal district court for the Southern District of Georgia. On April 29, 1981, the district court granted the writ with regard to petitioner's death sentence but denied relief on his other claims. This appeal and cross-appeal followed.

II. *Facts*

At the time of Fredger Stapleton's death, Moore was an enlisted man in the United States Army. In connection with his military service, Moore met George Curtis, a nephew of Fredger Stapleton. Curtis told Moore that Mr. Stapleton kept a large sum of money at his home. At first, Moore and Curtis planned to rob the victim together and to set fire to the house with Stapleton inside. After entering Stapleton's house, Curtis and Moore found a locked door. Curtis became frightened and the two re-

* Honorable Reynaldo G. Garza, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

turned to Curtis' house. Subsequently Moore returned to Stapleton's house alone. However, he armed himself with a .38 caliber pistol in case he met opposition in his robbery attempt. Moore claims that he did not intend to kill Stapleton.

Moore claims that Stapleton confronted him with a shotgun. Stapleton fired a shotgun blast at Moore which missed. Stapleton then hit Moore in the leg with the gun barrel. Petitioner then fired four or five shots at Stapleton, who was hit and killed by two bullets which struck him in the chest.

After the shooting, Moore removed two billfolds from the victim's pockets and took the shotgun. The money taken from Stapleton totaled approximately $5709. Moore was subsequently arrested and cooperated with the police during the investigation.

III.

A. *Imposition of Sentence*

The district court, holding that the Georgia Supreme Court did not properly discharge its statutory duty of appellate review, concluded that the imposition of the death penalty in this case "shocks the conscience" and granted relief with regard to sentence. Under the Georgia system, the sentencing authority, either a judge or a jury, may impose the death sentence when it finds the existence of a statutory aggravating circumstance.[1] Ga.Code Ann. § 17-10-31 (1982) (formerly Ga.Code Ann. § 26-3102). If the sentencing authority elects to impose the death penalty, it must specify the aggravating circumstance which it found beyond a reasonable doubt. Ga.Code Ann. § 17-10-30(c) (1982) (formerly Ga. Code Ann. § 27-2534.1(c)). Whenever the death penalty is imposed, the Georgia Supreme Court must conduct an expedited review of the case. Ga.Code Ann. § 17-10-35 (1982) (formerly Ga.Code Ann. § 27-2537). In reviewing the sentence, the court must determine whether the sentence was imposed "under the influence of passion, prejudice, or any other arbitrary factor," whether the evidence supports the finding of a statutory aggravating circumstance, and "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Ga.Code Ann. § 17-10-35(c) (1982) (formerly Ga. Code Ann. § 27-2537(c)). The court must also include in its decision a reference to those "similar cases" which it took into consideration. Ga.Code Ann. § 17-10-35(c)

1. Statutory aggravating circumstances include:
(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.
(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.
(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.
(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.
(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.
(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.
Ga.Code Ann. § 17-10-30(b) (1982) (formerly Ga.Code Ann. § 27-2534.1(b)).

(1982) (formerly Ga.Code Ann. § 27-2537(c)).

[1] In the case at bar, Judge McMillan sentenced Moore to death after finding that petitioner had committed a capital offense, malice murder, while in the commission of another capital crime, armed robbery. This finding was itself sufficient to support a death sentence under Georgia law and was supported by the record. *See* Ga.Code Ann. § 17-10-30(b)(2) (1982) (formerly Ga.Code Ann. § 27-2534.1(b)(2)). After reading his order and announcing the sentence which he imposed,[2] Judge McMillan continued:

> [F]or the purposes of this Court, for this finding, I could not in good conscience apply in your case sufficient to wipe out the aggravating statutory circumstances. If we're going to philosophy about it, and if I'm permitted to do that, I'll do it. People in their homes—the most precious place a man can have—is his home; and to be in a home, and probably this man was asleep, I don't know, or for any person to be, not this man, but any person, to be asleep in his home, to be invaded by an intruder, that's armed with weapons, that's prepared necessarily to kill (or otherwise the weapon wouldn't be there in the hands of the intruder), is probably an invasion of the highest injustice that another can do. Now, I can only imagine that anyone that is invaded by an intruder with an armed weapon, the fear that they must go through when they are encountered in such a situation. So I feel like that if the Court ever does require mandatory punishment—that is when they specify by law what offenses will have to be suffered by the electric chair—that one of these statutory offenses probably will be that when a person is robbed and killed in his home, that mandatory, as contrasted to discretionary, statutory aggravated circumstances will probably warrant the electric chair without life imprisonment. That justifies me in making the finding that I made.

In granting habeas relief from the sentence, the district court found that the sentence was based primarily on the location of the killing, Stapleton's home, and not on the presence of the aggravating circumstance articulated in the trial judge's order. The district court concluded that the Georgia Supreme Court did not perform its statutory duty properly since it focused on "similar cases" involving different circumstances. In the district court's view, the Georgia court should have compared Moore's case to "similar cases," and that "similar cases" would be those involving killing in the home. The district court engaged in its own proportionality review on this basis and concluded that the death penalty in the case at bar "shocked the conscience."

B. *District Court's Analysis*

Judge Edenfield held that the death penalty was inappropriate in this case after concluding that the Georgia Supreme Court erred in performing its proportionality review. In upholding the constitutionality of the Georgia sentencing procedure, the United States Supreme Court noted the Georgia Supreme Court's mandatory review of all death sentences.[3] *Gregg v. Georgia*, 428

2. Judge McMillan made his comments after he had read his order which cites only the one statutory aggravating circumstance as the basis for the sentence. He had not concluded the sentencing proceeding and his remarks should therefore be viewed as part of the proceedings. This situation differs from one in which the trial judge makes post-proceeding statements concerning the influence various facts had on his decision. It is analogous to a sentencing jury adding non-charged non-statutory aggravating circumstances to a form listing aggravating circumstances determined by the trial judge to be warranted by the evidence. *See Edonga v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Generally, post-proceeding testimony by the trial judge or a juror about his mental processes in reaching a decision may not be used as evidence in a subsequent challenge to the decision. *Washington v. Strickland*, 693 F.2d 1243, 1262-63 (5th Cir. Unit B 1982) (en banc), *petition for cert. filed*, — U.S. —, 103 S.Ct. 2451, 75 L.Ed.2d — (1983) (No. 82-1554). *Proffitt v. Wainwright*, 685 F.2d 1227, 1255 (11th Cir.1982).

3. We do not decide whether the Supreme Court has mandated that capital punishment may only be imposed where a state has provided for some type of proportionality review. *See Har-*

U.S. 153, 198, 203–06, 96 S.Ct. 2909, 2936, 2939–2940, 49 L.Ed.2d 859 (1976) (Stewart, J., joined by Powell and Stevens, JJ.); *id.* at 211, 223–24, 96 S.Ct. at 2942–43, 2948–49 (White, J., joined by Burger, C.J., and Rehnquist, J., concurring). In reviewing the Georgia court's proportionality review, we examine only whether the Georgia Supreme Court has "properly perform[ed] the task assigned to it under the Georgia statutes." *Id.* at 224, 96 S.Ct. at 2948 (White, J., joined by Burger, C.J., and Rehnquist, J., concurring).

[2–4] As a federal court reviewing a collateral attack on a state prosecution, we must give great deference to the Georgia Supreme Court's method of conducting its proportionality review. It is the decision of the state government as a matter of state statutory law, subject to federal constitutional constraints, to decide whether or not to provide a capital punishment mechanism and to provide for appropriate procedural safeguards. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 883, 71 L.Ed.2d 1 (1982) (Burger, C.J., joined by White, Blackmun, and Rehnquist, JJ., dissenting); *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980) (Stewart, J., joined by Blackmun, Powell and Stevens, JJ.) ("if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty"); *Wainwright v. Spenkelink*, 442 U.S. 901, 903, 99 S.Ct. 2421, 2422, 60 L.Ed.2d 1075 (1979) (Rehnquist, J., dissenting) ("a State whose citizens have expressed through their elected representatives and their judges and juries a will to impose the death penalty for offenses such as murder may do so if the State conforms its trial and sentencing procedures to the requirements enunciated in this Court's cases"); *Roberts v. Louisiana*, 428 U.S. 325, 337, 96 S.Ct. 3001, 3007, 49 L.Ed.2d 974 (1976) (White, J., joined by Burger, C.J., Blackmun and Rehnquist, JJ., dissenting). Federal habeas courts must and should examine whether the application of approved sentencing procedures in a particular case creates a substantial risk that the punishment has been inflicted in an arbitrary and capricious manner. *E.g., Enmund v. Florida*, — U.S. —, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Spinkellink v. Wainwright*, 578 F.2d 582, 604 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

This court concluded in *Spinkellink v. Wainwright* that a federal habeas court generally cannot reexamine the proportionality review performed by a state appellate court in a capital case. 578 F.2d at 604. Spinkellink had contended that his crime when compared to other Florida death penalty cases was insufficiently gruesome or heinous to warrant the death penalty, *id.* at 602, and had highlighted seven other cases in which the Florida Supreme Court had reversed death sentences, all of which allegedly involved defendants equally or more deserving of the death penalty than he, *id.* at 602 n. 25. This court condemned a federal case by case analysis of the cases used by the state appellate court in its proportionality review as an unnecessary intrusion on the Florida judicial system. *Id.* at 604.

> The process would be never-ending and the benchmark for comparison would be chronically undefined. Further, there is no reason to believe that the federal judiciary can render better justice.... If the federal courts retried again and again the aggravating and mitigating circumstances in each of these cases, we may at times reach results different from those reached in the Florida state courts, but our conclusion would be no more, nor no less, accurate. Such is the human condition.

Id. at 605. The court qualified this doctrine of non-interference by noting that federal

ris v. Polley, 692 F.2d 1189, 1196–97 (9th Cir. 1982), *cert. granted*, — U.S. —, 103 S.Ct. 1423, 75 L.Ed.2d 787 (1983); *Williams v. Maggio*, 679 F.2d 381, 395 (5th Cir.1982) (en banc).

court intervention might be warranted if "a petitioner who has been sentenced to death can show that the facts and circumstances of his case are so clearly undeserving of capital punishment that to impose it would be patently unjust and would shock the conscience." *Id.* at 605 n. 28.

Petitioner argues that the review conducted by the Georgia Supreme Court in this case reached a result so extreme as to "shock the conscience." *Blake v. Zant*, 513 F.Supp. 772 at 812. Looking at Judge McMillan's comment, the district court concluded that he had based his sentencing decision on the fact that Moore had killed the victim in the victim's own home. The Georgia Supreme Court did not base its comparison of "similar cases" on cases involving victims who were attacked in their homes and focused its review on cases involving the same statutory aggravating circumstances found in Judge McMillan's order. In the district court's view, the Georgia Supreme Court's analysis was improper since it chose the wrong cases to compare.[4] The district court concluded that the Georgia court's inadequate comparison justified the district court in engaging in its own proportionality analysis.

[5-9] We hold that the district court erred in conducting its own proportionality review in the case at bar. A federal habeas court should not undertake a review of the state supreme court's proportionality review and, in effect, "get out the record," and see if the state court's findings of fact, their conclusion based on a review of similar cases, was supported by the "evidence" in the similar cases. To do so would thrust the federal judiciary into the substantive policy making area of the state. It is the state's responsibility to determine the procedure to be used, if any, in sentencing a criminal to death.

The Georgia Supreme Court's proportionality review in this case provided the adequate safeguard against the freakish imposition of capital punishment.[5] *See Gregg v. Georgia*, 423 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). While we may have reached a different conclusion regarding the proportionality of the sentence had we conducted a case-by-case comparison, we cannot conclude that the Georgia Supreme Court's review or the result it reached shocked the conscience.[6]

4. In a sense, Moore's argument provides a significant basis for distinguishing *Spinkellink*. Spinkellink urged the court to compare the facts involved in other cases with those involved in his crime. Such a comparison, Spinkellink contended, would lead the federal court to conclude that application of the death penalty in his case was arbitrary, irrational, and capricious. Moore, on the other hand, does not challenge the result that the Georgia Supreme Court reached in its proportionality review. Moore seeks to establish that the Georgia Supreme Court "failed properly to perform its task in this case" of reviewing "similar cases." *See Gregg v. Georgia*, 423 U.S. at 224, 96 S.Ct. at 2949 (White, J., joined by Burger, C.J., and Rehnquist, J., concurring).

5. Different state supreme courts which have engaged in this type of proportionality review have suggested different methods of defining "similar cases." In *State v. Copeland*, S.C., 300 S.E.2d 63 (1982), the South Carolina Supreme Court defined the "universe" of similar cases as inclusive of all state cases in which the sentencing authority constitutionally imposed a death sentence based on similar findings of statutory aggravating circumstances. In *Williams v. Maggio*, 679 F.2d 381 (5th Cir.1982) (*en banc*), the court of appeals held that the Louisiana Supreme Court's review, a comparison of murder prosecutions in the particular judicial district from which the defendant appealed, provided adequate safeguards against freakish imposition of capital punishment. In the recent case of *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, 355-57 (1983), the North Carolina Supreme Court held that similar cases for purposes of a proportionality review included "*all cases* arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by this Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time."

6. Even if we conclude that the Georgia Supreme Court's determination shocked the conscience, we would be required to remand the case to allow the state court to resentence the petitioner. A federal habeas court may not

C. *Consideration of Non-Statutory Aggravating Circumstances*

[10, 11] We conclude that the sentencing judge committed constitutional error by considering a nonstatutory aggravating factor in imposing the death penalty. In analyzing constitutional issues in the wake of the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1971), we focus on the discretion both available to and exercised by the sentencing authority. The fragmentation of the Supreme Court in *Furman*[7] resulted in various conclusions by the states with regard to the role of discretion in capital sentencing. The thrust of the Court's decision is now clear in light of subsequent decisions: unbridled discretion in death penalty procedures leading to imposition of the sentence in a discriminatory, arbitrary, or capricious manner is unconstitutional.

This message was not as clear in the immediate wake of the *Furman* decision. In *Furman*, the Supreme Court held that then existing Georgia and Texas death penalty statutes, as applied in those particular cases, constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments. *Id.* 408 U.S. at 239–49, 92 S.Ct. at 2727. In order to understand the relationship between Judge McMillan's comment and the sentence which he imposed, we are mindful of the years that have passed since Judge McMillan undertook the task of sentencing under the then newly-enacted Georgia death penalty statute and the cases that have been decided. Those precedents are available to this court; Judge McMillan was bound to predict developments which could then be but dimly perceived. His predictions were consistent with those of many other thoughtful analysts, yet in a crucial area they were incorrect.

In determining whether Judge McMillan imposed the death sentence in accordance with constitutional limitations, we must evaluate his comments in light of the discretion accorded to sentencing authorities in post-*Furman* Supreme Court cases involving capital punishment. In the wake of *Furman* those states which wished to implement capital punishment mechanisms responded in several ways. Some states, such as Georgia and Florida, sought to bridle and channel previously unchecked discretion by adopting a bifurcated guilt-determination and sentence-imposition procedure in which the death penalty could only be imposed in the presence of statutorily designated aggravating circumstances.[8] Texas responded

conduct a *de novo* proportionality review and thereby inject itself into the state sentencing procedure. Our review remains confined to whether the state sentencing procedure both on its face and as applied violates the eighth and fourteenth amendments. *See Spinkellink v. Wainwright*, 578 F.2d at 605 n. 28.

7. In *Furman*, Justices Douglas, Brennan, Stewart, White and Marshall filed separate opinions in support of the judgment holding the Texas and Georgia death penalty statute unconstitutional as applied in the case. Chief Justice Burger, Justices Blackmun, Powell, and Rehnquist filed separate dissenting opinions.

8. Florida and Georgia did not adopt identical capital punishment systems. In Georgia, either the jury or the judge may impose sentence. Ga.Code Ann. § 17-10-2 (1982) (formerly Ga. Code Ann. § 27-2503). The Georgia statutes do not define mitigating circumstances. The judge or jury may impose a death sentence only after finding one of the statutory aggravating circumstances (except in cases of treason and aircraft hijacking) and electing to impose that sentence. Ga.Code Ann. §§ 17-10-31 (1982) (formerly Ga.Code Ann. § 26-3102), 17-10-32 (1982) (formerly Ga.Code Ann. § 27-2528). In jury cases, the trial judge is bound by the jury's recommended sentence. Ga.Code Ann. § 17-10-31 (1982) (formerly Ga.Code Ann. § 26-3102).

The Florida mechanism, approved by the Supreme Court in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), while similar in many respects, differs slightly from the Georgia system in delineating the discretion given to the sentencing authority. The evidence presented at the sentencing hearing must include matters relating to certain legislatively specified aggravating and mitigating circumstances. Fla.Stat.Ann. § 921.141. At the conclusion of the sentencing hearing, the judge directs the jury to consider "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death." Fla.Stat.Ann.

by limiting capital homicides to intentional and knowing murders committed in five situations and adopted a capital-sentencing procedure that requires the jury to answer three questions in a separate sentencing proceeding.[9] If the jury finds that the state has proved beyond a reasonable doubt that the answer to each of the three questions is yes, the death sentence is imposed. Tex.Code Crim.Proc., Art. 37.071(c), (e) (1981) (as amended).[10] The North Carolina legislature responded to *Furman* by adopting a mandatory death penalty law for a specified class of crimes. 1973 N.C.Sess. Laws Ch. 1201. The Louisiana legislature converted the existing discretionary death penalty statute to a wholly mandatory one requiring that the death penalty be imposed whenever the jury found the defendant guilty of the newly defined crime of first-degree murder. La.Rev.Stat.Ann. § 14:30 (1974).

In 1976, the Supreme Court addressed the constitutionality of these death penalty procedures. The court upheld the Georgia, Florida, and Texas mechanisms while invalidating the North Carolina and Louisiana statutes. In upholding the Georgia, Florida, and Texas statutes, the Court focused on the need for channeling the sentencing authority's discretion by clear and objective standards and providing the decision maker with relevant and accurate information. *See Gregg v. Georgia*, 428 U.S. 153, 188–89, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976) (Stewart, J., joined by Powell and Stevens, JJ.) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action); *id.* at 199, 96 S.Ct. at 2937 (existence of discretionary stage does not invalidate Georgia procedure); *id.* at 220–23, 96 S.Ct. at 2947–48 (White, J., joined by Burger, C.J., and Rehnquist, J., concurring); *Proffitt v. Florida*, 428 U.S. 242, 252–54, 96 S.Ct. 2960, 2966–67, 49 L.Ed.2d 913 (1976) (Stewart, J., joined by Powell and Stevens, JJ.); *id.* at 258, 96 S.Ct. at 2969 ("the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition"); *Jurek v. Texas*, 428 U.S. 262, 270–74, 96 S.Ct. 2950, 2955–57, 49 L.Ed.2d 929 (1976) (Stewart, J.,

§§ 921.141(2)(b) and (c). The jury's verdict is determined by majority vote. The jury's sentence is only advisory; the trial judge determines the actual sentence. The Florida system also directs the trial judge to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed on a defendant. The statute requires that if the trial court imposes a death sentence, "it shall set forth in writing its findings upon which the sentence of death is based as to the facts: (a) [t]hat sufficient aggravating circumstances exist ... and (b) [t]hat there are insufficient mitigating circumstances ... to outweigh the aggravating circumstances. Fla.Stat.Ann. § 921.-141(3).

9. The jury must answer the following questions:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex.Code Crim.Proc., Art. 37.071(b) (1981).

10. Unlike the Florida system which requires a majority jury vote, the jury under the Texas system approved in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), can answer "yes" only if all members agree; it can answer "no" if 10 of the 12 members agree. Tex.Code Crim.Proc., Art. 37.071(d) (1981). The Supreme Court noted in *Jurek* that Texas law was unclear as to the procedure to be followed in the event that the jury was unable to answer the questions. *Jurek v. Texas*, 428 U.S. at 269 n. 5, 96 S.Ct. at 2955 n. 5. The Texas legislature subsequently amended Texas Code of Criminal Procedure, Article 37.071(e) to provide that if the jury is unable to answer any question submitted under this article, the court shall sentence the defendant to life imprisonment.

joined by Powell and Stevens, JJ.) ("the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstance of the individual offense and the individual offender before it can impose a sentence of death").

Although language in *Furman*'s opinion supported Judge McMillan's prediction that the Supreme Court would approve only capital punishment mechanisms which eliminated discretion, *Furman v. Georgia*, 408 U.S. at 257, 92 S.Ct. at 2735–36 (Douglas, J., concurring); *id.* at 307–09, 92 S.Ct. at 2761–62 (Stewart, J., concurring); *id.* at 311, 92 S.Ct. at 2763 (White, J., concurring), the Court invalidated the mandatory North Carolina and Louisiana mechanisms. In doing so, the Court emphasized the need for discretion and an individualized sentencing procedure. In *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), Justice Stewart emphasized that "mandatory statutes enacted in response to *Furman* have simply papered over the problem of unguided and unchecked jury discretion," *id.* at 302, 96 S.Ct. at 2990 (Stewart, J., joined by Powell and Stevens, JJ.), and stated that the eighth amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death." *Id.* at 304, 96 S.Ct. at 2991.[11] Similarly, the Court held that Louisiana's mandatory death penalty statute "fail[ed] to comply with *Furman*'s requirement that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences. *Roberts v. Louisiana*, 428 U.S. 325, 334, 96 S.Ct. 3001, 3006–7, 49 L.Ed.2d 974 (1976) (Stewart, J., joined by Powell and Stevens, JJ.).

The thrust of these and subsequent cases has not been to eliminate all discretion from capital punishment mechanisms; rather, the Supreme Court has focused on channeling discretion to minimize the risk of arbitrary decision-making. *E.g., Eddings v. Oklahoma*, 455 U.S. 104, 110–15, 102 S.Ct. 869, 874–76, 71 L.Ed.2d 1 (1982); *Godfrey v. Georgia*, 446 U.S. 420, 427–28, 100 S.Ct. 1759, 1764–65, 64 L.Ed.2d 398 (1980) (Stewart, J., joined by Blackmun, Powell, and Stevens, JJ.); *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978); *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204–05, 51 L.Ed.2d 393 (1977) (Stevens, J., joined by Stewart and Powell, JJ.), *Gregg v. Georgia*, 428 U.S. at 188–89, 96 S.Ct. at 2932–33 (Stewart, J., joined by Powell and Stevens, JJ.); *Proffitt v. Florida*, 428 U.S. at 258, 96 S.Ct. at 2969 (Stewart, J., joined by Powell and Stevens, JJ.); *Woodson v. North Carolina*, 428 U.S. at 302, 96 S.Ct. at 2990 (Stewart, J., joined by Powell and Stevens, JJ.); *Furman v. Georgia*, 408 U.S. at 248–49 & n. 11, 92 S.Ct. at 2731–32 & n. 11 (Douglas, J., concurring); *id.* at 309–10, 92 S.Ct. at 2762–63 (Stewart, J., concurring); *id.* at 313, 92 S.Ct. at 2764 (White, J., concurring). *Furman* requires only that sentencing discretion "be 'directed and limited,' so that the death penalty would be imposed in a more consistent and rational manner and so that there would be a 'meaningful basis for distinguishing the ... cases in which it is imposed from ... the many cases in which it is not.'" *Lockett v. Ohio*, 438 U.S. at 601, 98 S.Ct. at 2963 (quoting *Gregg v. Georgia*, 428 U.S. at 188–89, 96 S.Ct. at 2932). In *Lockett*, the Court broadened the sentencing authority's discretion to allow consideration of all mitigating circumstances in making the individualized sentencing decision mandated by *Woodson* and *Roberts*.[12]

11. Justice Stewart's opinion implies that mandatory death penalty statutes applied to an extremely narrow category of crimes defined in large part in terms of the offender's character or record may be constitutionally permissible. *Id.* 428 U.S. at 287 nn. 7 and 8, 292 n. 25, 96 S.Ct. at 2983 nn. 7 and 8, 2985 n. 25.

12. Justice White, recognizing the arbitrary nature of any exercise of discretion, feared that allowing the sentencing authority to consider all mitigating circumstances would result in arbitrary and capricious imposition of the death sentence.

Moreover, I greatly fear that the effect of the Court's decision today will be to compel

In sum, the Supreme Court's treatment of discretion in capital sentencing reflects an inherent tension between the requirement of individualized sentencing and the notion of comparative review based on objective standards. By approving the Georgia capital punishment procedure under which no person might be sentenced to death unless found guilty of a statutorily defined capital offense under circumstances specified by the legislature as aggravating the crime, the Court undertook to eliminate discretion (other than the inherent pardoning power of an American jury) in finding the defendant eligible for the death penalty. By denouncing mandatory death penalties in *Woodson* and requiring that the sentencing authority be free to consider any mitigating circumstances, statutory or not, in *Lockett*, the Court emphasized the importance of individualized consideration of each defendant and all circumstances in deciding whether or not to impose upon such a defendant a sentence less than death.

Discretion exists in the Georgia Supreme Court's review of capital cases. The court exercises discretion in determining whether the death sentence was imposed under the influence of passion, prejudice, or other arbitrary factors and in selecting the "similar cases" for its proportionality review. See Ga.Code Ann. § 17-10-35 (1982) (formerly Ga.Code Ann. § 27-2537). Such discretion is necessary if the Georgia Supreme Court is to serve as a clearinghouse of all cases in which the death penalty has been imposed pursuant to the Georgia procedure and to ensure that the sentence has not been "freakishly" imposed. *See Godfrey v. Georgia*, 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980) (Stewart, J., joined by Blackmun, Powell, Stevens, JJ.); *Gregg v. Georgia*, 428 U.S. 153, 188–89, 96 S.Ct. 2909, 2932–33, 49 L.Ed.2d 859 (1976) (Stewart, J., joined by Powell & Stevens, JJ.).

Sensitive to the concern for channeling while not eliminating discretion, this court addressed the problem of consideration of non-statutory aggravating circumstances in *Henry v. Wainwright*, 661 F.2d 56 (5th Cir. 1981), *vacated and remanded on other grounds*, 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982), *aff'd*, 686 F.2d 311 (5th Cir. Unit B 1982), *petition for cert. filed*, —— U.S. ——, 103 S.Ct. 783, 74 L.Ed.2d 991 (1982). In that case, we held that it was constitutional error to allow a jury in a capital case to consider non-statutory aggravating factors in deciding whether the death penalty should be imposed. *See also, Zant v. Stephens*, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982) (presenting question of whether a reviewing court may constitutionally sustain a death sentence as long as one of a plurality of statutory aggravating circumstances found by the jury is valid) (certifying question to Georgia Supreme Court); *Barclay v. Florida*, 411 So.2d 1310 (Fla.1981), *cert. granted*, —— U.S. ——, 103 S.Ct. 340, 74 L.Ed.2d 382 (1982) (presenting question of whether death penalty must be set aside where based on a plurality of aggravating circumstances, including three invalid factors and a nonstatutory aggravating circumstance). Complete disclosure of the basis of the sentence, while not entitling a reviewing federal court to substitute its judgment for that of the sentencing authority, prevents review from becoming "simply a guessing game played by a reviewing court in which it tries to discern whether the improper nonstatutory factors exerted a decisive influence on the sentence determination." *Henry v.*

constitutionally a restoration of the state of affairs at the time *Furman* was decided, where the death penalty is imposed so erratically and the threat of execution is so attenuated for even the most atrocious murders that "its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." *Furman v. Georgia*, *supra* [408 U.S.], at 312 [92 S.Ct. at 2764] (White, J., concurring). By requiring as a matter of constitutional law that sentencing authorities be permitted to consider and in their discretion to act upon any and all mitigating circumstances the Court permits them to refuse to impose the death penalty no matter what the circumstances of the crime. This invites a return to the pre-*Furman* days when the death penalty was generally reserved for those very few for whom society has least consideration.

433 U.S. at 632, 98 S.Ct. at 2982.

Wainwright, 651 F.2d at 59 (footnote omitted).

The Georgia death penalty system has channeled the discretion of the sentencing authority to certain limited areas. *See generally Zant v. Stephens*, 250 Ga. 97, 297 S.E.2d 1 (1982). The defendant must have been accused and convicted of committing a crime for which the state allows imposition of the death penalty in accordance with the constitutional prohibition of cruel and unusual punishment. *See Coker v. Georgia*, 433 U.S. 584, 591-98, 97 S.Ct. 2861, 2865-69, 53 L.Ed.2d 982 (1977) (White, J., joined by Stewart, Blackmun, and Stevens, JJ.) (holding that though rape deserves serious punishment, the death penalty, which is unique in its severity and irreversibility, is an excessive penalty for the rapist who does not take a human life). In order *absolutely* to structure discretion while not requiring mandatory death sentences, Georgia has strictly limited the application of the death sentence to cases where the sentencing authority finds the existence of certain enumerated statutorily authorized aggravating circumstances. The sentencing authority possesses no discretion in either redefining the crimes for which a defendant is to be sentenced to death or adding to the list of aggravating circumstances. Once the sentencing authority has determined the existence of a statutory aggravating circumstance, the defendant becomes eligible for a capital sentence. When this stage has been reached, the sentencing authority possesses the unbridled discretion to determine, based on relevant and accurate information, whether to impose a death sentence.[13] This discretion cannot be controlled if the decision-maker is to make an individualized decision at this eligibility level. *See Eddings v. Oklahoma*, 455 U.S. at 123-28, 102 S.Ct. at 881-83 (Burger, C.J., joined by White, Blackmun, and Rehnquist, JJ., dissenting). The sentencing authority possesses unbridled discretion to consider any perceived mitigating circumstances. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 937 (1978). While discretion to impose the death penalty for any reason which might be capricious is denounced, *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1971), it now appears that discretion to grant mercy—perhaps capriciously—is not curtailed. The sentencing authority can assign what it deems the appropriate weight to particular mitigating circumstances. Moreover, with unbridled consideration of mitigating circumstances the sentencing authority may consider something to be mitigating that others would consider to be aggravating. Some might say that a stable family background is mitigating; others might reasonably say that this is an aggravating factor. Different sentencing authorities could assign different weights to the same aggravating circumstances. The Constitution does not assign specific weights to different aggravating or mitigating circumstances.

[12] In the case at bar, Judge McMillan, given the awesome task of sentencing, had the duty to examine the statutory aggravating circumstances. Judge McMillan considered both the commission of armed robbery and the location of the murder—the victim's home—in reaching his sentencing decision.[14] One might construe Judge

13. Unlike the Florida statutory system, the Georgia statutory mechanism does not explicitly require a weighing of aggravating circumstances against mitigating circumstances. *Goodwin v. Balkcom*, 684 F.2d 794, 801-02 (11th Cir.1982), *cert. denied*, — U.S. —, 103 S.Ct. 1790, 76 L.Ed.2d 361 (1983). *Compare* Ga.Code Ann. § 17-10-31 (1982) (formerly Ga. Code Ann. § 26-3102) *with* Fla.Stat.Ann. §§ 921.141(2)(b) and (c). Both systems, however, require a subjective balancing by not automatically imposing the death sentence in cases where aggravating circumstances are found. Both systems require the sentencing authority to list specifically the aggravating circumstances found in a particular case. *Id.*

14. He stated:

> [I]f the Court ever does require mandatory punishment—that is when they specify by law what offense will have to be suffered by the electric chair—that one of these statutory offenses probably will be that when a person is robbed and killed in his home, that mandatory, as contrasted to discretionary, statutory aggravated circumstances will probably warrant the electric chair without life imprisonment. That justifies me in making the finding that I made.

McMillan's statement as both an explanation of why he viewed armed robbery in this case to be a sufficient reason to authorize and require him to impose the death penalty and a description of his thought process in evaluating the statutory aggravating factors.[15] We do not believe that such evaluation would violate the Constitution in view of the requirement of an individualized sentencing process. *See Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 937 (1978); *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983) (en banc).

Close examination of Judge McMillan's statement reveals, however, that he established a further and different non-statutory aggravating circumstance of murder committed in the victim's home. Judge McMillan imposed this sentence after *Furman* but before *Gregg* and *Woodson* when reasonable interpreters of *Furman* could conclude that there could be no discretion and that ultimately, discretion would be absolutely eliminated by mandatory death sentences for specified crimes. Judge McMillan "justified" his sentence on the belief that murder in the victim's home would require a mandatory death sentence.

This interpretation of Judge McMillan's statement is consistent with the court's recent decision in *Goode v. Wainwright*, 704 F.2d 593 (11th Cir.1983). In *Goode*, the trial judge, after the Florida jury had recommended death, listed three aggravating circumstances and two mitigating circumstances and stated that the mitigating circumstances did not outweigh the aggravating circumstances. *Id.*, at 604. He justified his sentencing of Goode to death, stating that "there are certain cases and certain times when we can no longer help, we can no longer rehabilitate, and there are certain people, and Arthur Goode is one of them, that's [whose] actions demand that society respond and all we can do is exterminate." *Id.*, at 605. He concluded that a death sentence would "guarantee society, at least as far as it relates to this man, . . . that he will never again kill, maim, torture, or harm another human being." *Id.* The court of appeals concluded that these statements indicated that the trial judge had improperly relied on a nonstatutory aggravating circumstance—impossibility of rehabilitation—and granted habeas relief.[16] *Id.* at 612.

[13] As the Court found in *Goode* upon examining the trial judge's statement, we conclude that Judge McMillan justified his sentence on an improper factor. Judge McMillan's statement indicates that Moore's death sentence was imposed in reliance on an aggravating factor which the Georgia

15. Under the Georgia capital punishment system, the sentencing authority which imposes a death sentence must specify the aggravating circumstance(s) found. Ga.Code Ann. § 17-10-30(c) (1982) (formerly Ga.Code Ann. § 27-2534.1(c)). The trial court must also transmit a transcript and complete record of the trial as well as a separate report by the trial judge to the Georgia Supreme Court. Ga.Code Ann. § 17-10-35(a) (1982) (formerly Ga.Code Ann. § 27-2537(a)). This report is in the form of a 6½ page questionnaire designed to elicit information about the defendant, the crime, and the circumstances of the trial. The report includes responses to detailed questions concerning the quality of the defendant's representation, whether race played a role in the trial, and whether in the trial judge's judgment, there was any doubt about the defendant's guilt or the appropriateness of the sentence. *Id.*

In his report, Judge McMillan listed the advance planning of Moore to commit the crime as a non-statutory circumstance which played a role in his decision. In imposing sentence in court, however, Judge McMillan clearly relied on the murder's location as another aggravating factor on the level of the statutorily enumerated factors in "justifying" his sentence.

16. While it appears more likely in the present case that Judge McMillan was creating a non-statutory aggravating circumstance, we must also look to the effect of such an error in his interpretation of the law, thus unschooled by *Gregg* and *Woodson*, to determine whether the death penalty was imposed in an arbitrary and freakish manner. Here, we have a case where the murder having occurred in the victim's home, Judge McMillan viewed the death penalty as mandatory. This error eliminated consideration of valid mitigating circumstances that might otherwise have been considered and thus constituted error of constitutional magnitude. We are not indicating how these factors should properly have been weighed but focus on the elimination of consideration of these other factors. *See Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 937 (1978).

legislature has not defined as an aggravating factor making the defendant eligible for capital punishment.[17] With the benefit of the Supreme Court's guidance, we now know that eligibility for a death sentence cannot be arbitrarily determined. The sentencing authority can determine eligibility only by finding the existence of guilt of a capital offense and the existence of statutory aggravating circumstances. For any reason or no reason at all the sentencing authority can impose a lesser sentence. Imposition of a death sentence on the basis of a non-statutory aggravating circumstance would represent a unique freakish instance in violation of *Furman*. We conclude that Judge McMillan unconstitutionally applied a non-statutory aggravating circumstance, necessarily precluding consideration of mitigating circumstances. Although his analysis at the time was consistent with that of other scholars, later cases teach us its faults. We therefore grant habeas corpus relief on the issue of petitioner's sentence.

IV. *Validity of Petitioner's Plea*

In his cross-appeal petitioner attacks the validity of his guilty plea, alleging that it was not intelligently and knowingly made. In *Henderson v. Morgan*, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976), the Supreme Court held that a guilty plea is voluntarily made when the accused understands the nature of the constitutional protections he is waiving and he completely understands the charge. *Id.* at 645 n. 13, 96 S.Ct. at 2257 n. 13. "Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary [as an intelligent admission of guilt]." *Id.*

Moore argues that he did not understand the elements of malice murder and that the record before the sentencing judge demonstrates Moore's lack of understanding. Petitioner notes that the trial judge never explained the terms "malice aforethought," "intention," "provocation," or "abandoned and malignant heart." Moore asserts that he did not intend to kill Mr. Stapleton and specifically denied such intent on numerous occasions. Petitioner argues that we must determine his understanding by referring only to the record before the sentencing judge.

Petitioner admitted that he was in fact guilty of the offense charged in the indictment. At the entry of his guilty plea and during the sentencing proceeding, Moore acknowledged that he had authorized his counsel, Mr. Pierce, to enter a plea of guilty. Petitioner indicated that he understood the court's inquiries, that he had not entered his plea as a result of threats, coercion, or promises of benefit, and that he had conferred with his attorney concerning the charges against him and the questions posed to him by the court. The question before this panel is therefore whether Moore was given sufficient notice of the nature of the charges facing him in order to understand the crime.

[14] As a preliminary matter, we hold that the district court properly used the testimony received from petitioner and Mr. Pierce at the state habeas proceeding in addressing this issue. "Evidence obtained at a post-conviction proceeding may serve to supplement the trial transcript and may be used in determining whether a plea was voluntarily made." *Pollinzi v. Estelle*, 628 F.2d 417, 418 (5th Cir.1980); *Fisher v. Wainwright*, 584 F.2d 691, 693 (5th Cir. 1978). At this proceeding, Mr. Pierce testified that he had explained the elements of the crime[18] to Moore and the requirement

17. We need not comment on whether murder committed in the home would be a proper aggravating circumstance because Georgia has never included this factor as a statutory aggravating circumstance in Ga.Code Ann. § 17-10-30 (1982) (formerly Ga.Code Ann. § 27-2534.1).

18. Ga.Code Ann. § 16-5-1 (1982) (formerly Ga. Code Ann. § 26-1101) which defines the crime of malice murder provides:

(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

(b) Express malice is that deliberate intention unlawfully to take the life of another

of a finding of aggravating circumstances in order to impose the death penalty. Petitioner has failed to overcome the presumption of correctness which attaches to the state habeas court's findings of fact. *See* 28 U.S.C. § 2254(d) (1976).

[15] Petitioner relies heavily on the trial court's failure to address individually the particular elements of the crime charged when accepting the plea. State trial courts need not specifically address each individual element required under a state statute in order to accept a guilty plea. *See Burden v. State of Alabama*, 584 F.2d 100, 102 (5th Cir.1978) (record must contain some evidence that defendant was informed of elements of crime or some representation by counsel concerning the information which the defendant received). The judge need only explain the statute sufficiently to give the defendant real and adequate notice of the nature of the charge against him or find proof that the defendant in fact understood the charge. *Henderson v. Morgan*, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976). In the case at bar, both the petitioner's answers to questions posed in open court and testimony from his attorney support the conclusion that he in fact understood the nature of the charges against him.

V. *Awareness of Right to Withdraw Guilty Plea*

[16, 17] Petitioner contends that he was not made aware of his right to withdraw his guilty plea at any time prior to the filing of his sentence. He contends that had he been aware of this right, he would have withdrawn his plea. Both the federal and state habeas courts found that Moore was aware of this right. Mr. Pierce specifically recalled advising petitioner of this right. Counsel also explained that petitioner had decided, upon his recommendation, not to withdraw the plea even if a death sentence were imposed. Petitioner relies solely on his own testimony that he was unaware of this right. We conclude that the district court properly relied upon the written factual determinations of the state habeas court after a full evidentiary hearing in concluding that Moore was aware of his right to withdraw his plea and made a reasoned decision not to do so. *Grantling v. Ralkcom*, 632 F.2d 1261 (5th Cir.1980).

Counsel's and petitioner's decision to seek relief on appeal rather than withdrawing the plea represented a strategic decision. *See Washington v. Strickland*, 693 F.2d 1243, 1258–54 (5th Cir. Unit B 1982) (en banc), *petition for cert. filed*, — U.S. —, 103 S.Ct. 2451, 75 L.Ed.2d — (1983). Questions of trial strategy or tactics, particularly when consented to by the defendant, do not constitute a basis for federal habeas relief in the absence of exceptional circumstances. *See Coco v. United States*, 569 F.2d 307 (5th Cir.1978). Since petitioner has failed to show such exceptional circumstances, we hold that petitioner was provided with effective assistance of counsel.

VI. *Absence of Transcript of Closing Argument*

Petitioner also argues that the trial court's failure to transcribe the closing arguments at his sentencing hearing prevented the reviewing courts from examining the imposition of his death sentence with "full disclosure of the basis for the death sentence." *Gardner v. Florida*, 430 U.S. 349, 361, 97 S.Ct. 1197, 1206, 51 L.Ed.2d 393 (1977) (Stevens, J., joined by Stewart and Powell, JJ.). The Court in *Gardner*, however, mandated only that "the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed." *Id.* In *Gardner*, the trial judge based his sentence in part on information contained in a partially disclosed presentence investigation report. In the case at bar, the record contains the transcript of Judge McMillan's imposition of sentence which does not refer to any undisclosed aspect of the proceeding on which he relied in imposing sentence. Moore has not shown

human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

that the state of the record was inadequate to permit the Georgia Supreme Court to perform its required review function. *See Stephens v. Zant*, 631 F.2d 397, 402-04 (5th Cir.1980), *modified on other grounds*, 648 F.2d 446 (5th Cir.), *cert. granted*, 454 U.S. 814, 102 S.Ct. 90, 70 L.Ed.2d 82 (1981), 456 U.S. 410, 102 S.Ct. 1855, 72 L.Ed.2d 222 (1982) (certifying question to Georgia Supreme Court).

VII. *District Court's Denial of Petitioner's Motion to Amend*

[18] Moore contends that the district court erred in refusing to allow him to amend his habeas petition. Federal Rule of Civil Procedure 15(a) provides that a party may amend his pleading after a responsive pleading has been served only by leave of court. The rule also states that "leave shall be freely given when justice so requires." Certainly in a capital case, the district court should be particularly favorably disposed toward a petitioner's motion to amend. Nevertheless, the granting or denial of leave to amend lies within the discretion of the trial court and is subject to reversal only for abuse of discretion. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); *Barrett v. Independent Order of Foresters*, 625 F.2d 73, 75 (5th Cir.1980); *In re Westec*, 434 F.2d 195, 202-04 (5th Cir.1970). In *Foman*, the Supreme Court held that the district court had abused its discretion when it denied leave to amend for no apparent or declared reason "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc." *Foman*, 371 U.S. at 182, 83 S.Ct. at 230. In *Barrett*, the court of appeals held that the trial judge had not abused his discretion where the proposed amendment was not filed until nearly ten months after the original complaint and the appellant failed to show why the proposed additional matters could not have been raised initially. *Barrett*, 625 F.2d at 75.

[19] In the case at bar, the district court articulated sufficient reasons within its discretion justifying its decision denying leave to amend. Moore sought to assert that the Georgia capital sentencing procedure violated the eighth and fourteenth amendment despite the Supreme Court's prior holding that the Georgia death penalty statute is on its face constitutional. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The district court therefore refused to allow this proposed amendment on grounds of futility. *Blake v. Zant*, 513 F.Supp. 772, 805 (S.D.Ga.1981). Moore also claims that the district judge should have allowed him to amend his petition to allege that Judge McMillan unconstitutionally used a presentence report in imposing sentence before the petitioner or his counsel had an opportunity to examine it. The district court found that petitioner had been represented by counsel at all times. Counsel explicitly referred to this issue in the original habeas petition filed approximately two years before the proposed amendment. We cannot say that the district court abused its discretion in denying the proposed amendment in this case where counsel apparently considered and rejected the proposed arguments two years before filing the proposed amendment.[19]

Conclusion

Because the trial judge based his sentence on both statutory and non-statutory factors, we grant habeas corpus relief conditioned upon the state's resentencing of Moore. The judgment of the district court on the appeal and cross-appeal is AFFIRMED and the case is REMANDED for proceedings consistent with this opinion.

19. Mr. James C. Bonner who had represented petitioner at the prior state habeas petition, filed the initial habeas petition in federal court. At the time the proposed amendment was filed, Ms. H. Diana Hicks represented Moore. Since Moore was represented at all times by counsel, though not by the same individual, we cannot say that the district court abused its discretion in refusing to allow the amendment. Had the original petition been filed without counsel, we would be presented with a different situation, on which we need not pass at this time.

GARZA, Circuit Judge, specially concurring:

I concur in the result reached in this case for two reasons: First, because I think this court is bound by the panel opinion in *Goode v. Wainwright*, 704 F.2d 593 (11th Cir.1983); and secondly, because, as the majority opinion points out, the state sentencing judge allowed an impermissible factor to enter into his deliberations—the fact that the victim was killed in his home. By the introduction of this circumstance not approved by Georgia statute, the state judge ignored the concept of channeled discretion that is crucial to the just administration of the death penalty.

While I concur with the result reached by the majority, I feel compelled to write a few words in order to clarify the distinctions between this case and *Williams v. Maggio*, 679 F.2d 381 (5th Cir.) (en banc), *cert. filed*, Docket No. 82-5868 (Dec. 10, 1982), a case I authored for the Fifth Circuit. In *Williams*, the Fifth Circuit affirmed a Louisiana jury's imposition of the death penalty despite the fact that there was insufficient evidence to support the jury's finding of one of the three statutory aggravating circumstances. That decision was based on the fact that the jury's discretion had been properly channeled by the court instructions which focused the jury's attention on only those statutory aggravating circumstances which could legitimately be considered. The jury was permitted to consider only those aspects of the crime which state law held sufficient to warrant consideration of the ultimate penalty.

Appellate review in *Williams* demonstrated that there was sufficient evidence to affirm the finding of one aggravating circumstance; the absence of sufficient evidence of one other circumstance is not troubling. The extra findings went to the gravity of the crime, not the jury's power to impose the death penalty. The Court held:

> Since the requisite one aggravating circumstance of murder in the course of an armed robbery is clearly present and was unanimously found by the jury, the other two circumstances are only material to deciding whether the aggravating and mitigating circumstances weighed together indicate the death penalty should be imposed. Here, the thing of significance is how the jurors perceived the weight of these actions by petitioner. The weight they assigned in determining whether the petitioner's acts were or were not outweighed by mitigating circumstances was necessarily to be tested by how they viewed the facts they properly knew. The jury necessarily focused on what Williams had done, not on how Louisiana classified his actions, since they were not instructed on the legal meaning of the terms involved. Louisiana's classifications did not change the weights the jury assigned in any material degree. The lack of precise legal definitions, therefore, affected none of petitioner's substantial rights.

679 F.2d at 389.

The situation considered in the instant case is similar to that considered in *Henry v. Wainwright*, 661 F.2d 56 (5th Cir.1981), wherein the Fifth Circuit held that constitutional error was committed when a jury was allowed to consider non-statutory aggravating circumstances in deciding whether the death penalty should be recommended. It is also very close to the scenario presented by *Stephens v. Zant*, 631 F.2d 397 (5th Cir.1980), *cert. granted*, 454 U.S. 814, 102 S.Ct. 90, 70 L.Ed.2d 82 (1981), *question certified to Georgia Supreme Court*, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), where the Fifth Circuit found error in the jury's consideration of an unconstitutional statutory aggravating circumstance—the offense was committed by one having a substantial history of serious assaultive criminal convictions—because the introduction of that circumstance required the jury to consider facts and circumstances not before them as a part of proof of the charged offense. The vague words of the statute failed to properly guide as to how the state classified the aggravating circumstance; the jurors, therefore, had no principled way by which to determine the impact

of proof of other crimes on the assessment of the death penalty. In both *Stephens* and *Henry*, jurors were allowed to consider information outside the narrow scope of valid statutory aggravating circumstances. *Williams* does not suffer this weakness.

The Georgia legislature made an explicit judgment about the factors appropriate to make the crime of murder into a capital offense when it approved Ga.Code Ann. § 17-10-30 (1982). It is not the province of any judge or jury to expand upon that list. This, the majority finds, is precisely what the state judge did here. That action was clearly improper and warrants the grant of a writ of habeas corpus for the purpose of resentencing.

APPENDIX C

not going to affect the outcome of the plaintiff's lawsuit."

The court of appeals for the fifth circuit has stated the test for a "nominal party" in this context:

"'The ultimate test of whether the defendants are indispensable parties is whether in the absence of the [defendant], the Court can enter final judgment consistent with equity and good conscience which would not be in any way unfair or inequitable to plaintiff.'" *Tri-Cities Newspapers, Inc. v. Tri-Cities P. P. & A. Local 349*, 427 F.2d 325, 327 (5th Cir. 1970); quoting *Stonybrook Tenants Association, Inc. v. Alpert*, 194 F.Supp. 552, 559 (D.Conn.1961).

[2] Applying this test to the case at bar, I have no difficulty concluding that if the plaintiff prevailed and Coronet was not a party, the court could not enter the type of judgment that the plaintiff would be entitled to have. Under Wisconsin law, an insurer is directly liable, up to the amount of the policy, to persons entitled to recover for the negligence of the insured. Wis.Stat. § 632.24. Thus the plaintiff might be able to win a judgment directly against the insurer. However, if Coronet were not a party, the court could not include it in any judgment the plaintiff might be entitled to have entered. Thus Coronet is not a mere "depositary or stakeholder," *Tri-Cities*, supra, at 327, and it is also not a nominal party to this action. Accordingly, I will grant the plaintiff's motion for remand.

Therefore, IT IS ORDERED that the plaintiff's motion for remand be and hereby is granted.

IT IS ALSO ORDERED that this action be and hereby is remanded to the circuit court for Kenosha County, Wisconsin.

Joseph James BLAKE, Petitioner,

v.

Walter ZANT, Warden, Georgia Diagnostic and Classification Center, Respondent.

Christopher A. BURGER, Petitioner,

v.

Walter B. ZANT, Warden, Georgia Diagnostic and Classification Center, Respondent.

William Neal MOORE, Petitioner,

v.

Charles BALKCOM, Warden, Respondent.

Nos. CV480-251, CV280-114 and CV478-309.

United States District Court, S. D. Georgia, Savannah and Brunswick Divisions.

April 29, 1981.

Habeas corpus petitions were filed by three prisoners who had been sentenced to death. The District Court, E. Avant Edenfield, J., held that: (1) first petitioner's right to at least one psychiatric examination and opinion developed in a manner reasonably calculated to allow adequate review of relevant, available information and at such a time as would permit counsel reasonable opportunity to utilize analysis in preparation and conduct of the defense, was violated; (2) sentencing phase of second petitioner's trial was flawed in a way that may have prevented an informed process of jury deliberation and appellate review; and (3) constitutional mandates were not observed in appellate review of third petitioner's sentencing, and thus petitioner's sentence of death could not be sustained.

Ordered accordingly.

1. Criminal Law ⇐641.13(1)

A defendant is entitled to an attorney likely to render and, in fact, rendering rea-

manded to the Superior Court of Wayne County for further proceedings not inconsistent with this opinion.

So ordered.

CV478–309

Before the Court is a petition for writ of habeas corpus for review of the judgment of the Superior Court of Jefferson County, Georgia, and the conviction and sentence of death imposed upon the petitioner. Numerous arguments have been raised in support of this petition. All matters properly before the Court are considered below. After this review, the Court sees merit in only one: petitioner's claim that the penalty of death is cruel and unusual as applied to him in light of the circumstances of the crime and other relevant factors. Because this Court cannot conclude that the death penalty was appropriately reviewed by the Georgia Supreme Court or that such a review could support capital punishment under the facts of this case, petitioner's sentence of death must be vacated, and the case remanded for further proceedings.

Background

Petitioner was indicted by a grand jury in Jefferson County, Georgia, for the April 2, 1974 malice murder and armed robbery of Fredger Stapleton, an elderly black man and the uncle of an acquaintance of Mr. Moore. At a hearing conducted before Judge Walter C. McMillan, Jr. in the Superior Court of Jefferson County on June 4, 1974, petitioner waived trial by jury with respect to both guilt and sentence and entered a plea of guilty to all charges. Sentencing was postponed until July 17, 1974. At that time, Judge McMillan handed down the death penalty which is the subject of the present review.

The Supreme Court of Georgia affirmed petitioner's conviction and sentence in a *per curiam* opinion, with one justice dissenting, on February 12, 1975. On March 4, 1975, the Georgia court also denied a timely petition for rehearing. *Moore v. State*, 233 Ga. 861, 231 S.E.2d 829 (1975). Petition for writ of certiorari was denied by the United States Supreme Court on July 6, 1976. *Moore v. Georgia*, 428 U.S. 910, 96 S.Ct. 3222, 49 L.Ed.2d 1218 (1976). Petition for rehearing was similarly denied on October 4, 1976. *Moore v. Georgia*, 429 U.S. 873, 97 S.Ct. 190, 50 L.Ed.2d 154 (1976).

Thereafter, petitioner filed an action for declaratory judgment in the Jefferson County Superior Court seeking a new sentencing proceeding. Relief was denied and that denial affirmed by the Georgia Supreme Court. *Moore v. State*, 239 Ga. 67, 235 S.E.2d 519 (1977). Petition for writ of certiorari to review this determination was likewise rejected by the United States Supreme Court. 434 U.S. 873, 98 S.Ct. 222, 54 L.Ed.2d 159 (1977).

After the failure of this action for declaratory relief and also denial of a motion for withdrawal of his guilty plea, petitioner filed for writ of habeas corpus in the Superior Court of Tattnall County. An evidentiary hearing was held on March 30, 1978, and, on July 13, 1978, the court denied all relief. On October 17, 1978, the Supreme Court of Georgia denied application for a certificate of probable cause to appeal.

Mr. Moore's first petition for writ of habeas corpus before this Court, Civil Action No. 478–228, was dismissed voluntarily without prejudice after the Supreme Court of Georgia granted a stay of execution. Subsequently, petitioner's execution was rescheduled for December 4, 1978. The present action was filed November 22, 1978. At that time, Mr. Moore was again granted a stay of execution to permit consideration of the various arguments which were alleged as grounds for relief.

Facts

At the time of the homicide in question here, petitioner was an enlisted man in the United States Army, where he had served in several capacities, including as a military policeman. In connection with his military service, Mr. Moore met George Curtis, who was a nephew of the victim Fredger Stapleton. Curtis told the petitioner that Mr. Stapleton kept a large sum of money at his

home. Mr. Moore and Curtis first planned to rob the decedent together. Petitioner described their plan and subsequent developments as follows:

> We planned this, he wanted to burn his uncle up, he would get the money and burn him up in the house, and we went over there and Curtis got scared after he went into the house, that was the first time, we was drinking, we had been drunk ... we went over to the house, we went to the back door, and we got in between one of the bedrooms and the front room, there was a locked door, we left and went back over to Curtis' house, he left and I went back over there. I didn't have no intention of killing him. When I went in there, he came out there with a shotgun and hit me in the leg, it scared me, made me shoot him....

Hearing of July 17, 1974, at 48.

It thus appears that late in the evening of April 2, 1974, Mr. Moore reentered the Stapleton home through a bedroom window. Petitioner was armed with a .38 caliber pistol which he had taken out of the car especially to use in the event he encountered opposition. State Habeas Hearing, at 28. After gaining entrance, he was surprised by Stapleton, who came out of his bedroom and fired a shotgun at petitioner. Mr. Moore was not struck by the blast, though he was hit by the barrel of the gun itself. He then fired four or five shots at Stapleton, who was hit and killed by two bullets which struck him in the chest.

After the shooting, petitioner removed two billfolds from the victim's pockets and took the shotgun. He exited Stapleton's home through the front door and left the area in his car, which was parked nearby. The money taken from Stapleton totaled about $5,700. All was surrendered to police at the time of petitioner's arrest as was the shotgun and other evidence. In fact, Mr. Moore generally cooperated with police and made no attempt to conceal his guilt. *See* Hearing of July 17, 1974, at p. 54.

1. Of course, all arguments relating to error prior to entry of petitioner's plea of guilty, except ineffective assistance of counsel, were waived by that plea. *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1972). Thus, each of petitioner's first three points can be considered only in terms of counsel's performance.

Questions Presented

In his initial petition, Mr. Moore alleged the following constitutional violations: (1) failure to transcribe closing arguments at sentencing prevented adequate appellate review of the basis for the death penalty; (2) petitioner was not informed that malice-murder required intent and, thus, his plea was not knowingly and intelligently made, nor did it include any admission of intent; (3) petitioner was not informed of his right to withdraw his plea prior to filing of sentence because of ineffective assistance of counsel;[1] (4) the Georgia Supreme Court failed to carry out an adequate review of the propriety of a death sentence given the nature of the crime and the criminal.

By an amendment filed *pro se* on March 6, 1979, Mr. Moore added several other allegations of error. In particular, Mr. Moore claimed ineffective assistance of counsel in his attorney's alleged failure to (1) investigate and challenge the composition of the grand jury which indicted him; (2) inform petitioner that the grand jury could be challenged; (3) investigate local prejudice and seek a change of venue; and (4) have closing arguments transcribed. Mr. Moore also alleged error by the Georgia Supreme Court through use of an improper sample of cases in assessing the proportionality of his sentence.

On June 18, 1979, oral argument was held in this case before Honorable Curtis Ford, United States Magistrate, at Reidsville, Georgia. Petitioner was represented there by Mr. James C. Bonner who had also represented him in the prior state habeas proceeding. At this hearing, Mr. Bonner indicated that factual issues had generally been "fairly developed on the record" in the state habeas action. State Habeas Hearing, at 2. Thus, Mr. Bonner informed the Court that only the four issues stated in the initial petition for habeas corpus were before it,

and that these issues probably would not require an evidentiary hearing. Furthermore, Mr. Bonner directed the overwhelming majority of his argument "most particularly [to] whether or not [petitioner's] specific death sentence and the unique circumstances of his case constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments." *Id.*

Subsequent to this proceeding, Mr. Bonner requested leave to withdraw. This motion was granted by the Court, with Ms. H. Diana Hicks appointed as substitute counsel in October, 1980. Since entering the case, Ms. Hicks has moved that the Court permit still another amendment to the petition. This amendment generally restates arguments already before the Court. However, it would change the present pleadings by deletion of reference to ineffective assistance of counsel with respect to seeking a change of venue and challenging the composition of the indicting grand jury. The recast petition would also add allegations of error with respect to use of a presentencing report without prior examination by the petitioner and also a general argument that capital punishment is without theoretical justification and, hence, unconstitutional.

Respondent has objected to both the *pro se* amendment and the proposed amendment now before the Court. Respondent contends that the *pro se* amendment is improper in that it raises matters not brought before the state habeas court. However, respondent does not suggest dismissal for failure to exhaust state remedies, since a second state habeas action would surely be dismissed as successive. Ga.Code Ann. § 50-127(10); *Brown v. Ricketts*, 233 Ga. 209, 213 S.E.2d 672 (1975). Instead, respondent argues that this pleading should be struck as involving matters which the petitioner deliberately bypassed. Similarly, respondent contends that no further amendment should be permitted, since the errors alleged in the amendment were certainly known to petitioner's counsel when this suit was filed, now over two years ago.

[20] This Court is, of course, well aware that amendment is to be "freely given when justice so requires." Rule 15(a) F.R.Civ.P. Nor would the Court doubt that this general principle is due particular fidelity in a capital case such as the present action. Nonetheless, the Court can see no sound reason for permitting further amendment at this late stage of the present case. As respondent points out, the petitioner here has been represented by counsel at all times. Furthermore, counsel made explicit reference to the presentencing report issue in the original habeas petition, thus demonstrating beyond doubt that this matter had been considered by him and rejected as a basis for relief before this Court. Counsel's decision cannot be seen as unfounded. This question was considered at length by the state habeas tribunal. Testimony was received from Mr. Pierce and an affidavit was introduced from the officer who prepared the report. Upon examining this evidence and the trial transcript, which appears to show that the report was turned over to Mr. Pierce, see Transcript of July 17, 1978, at 27-28, the Court ruled adversely to the petitioner. No new evidence has been suggested which would cast doubt on this determination. Thus, the Court can find no basis for concluding that any sound reason exists to allow new counsel to resurrect this question. Motion to amend with respect to this argument is therefore denied.

The second proposed additional argument for relief here is even more dubious. There is, of course, no authority for the proposition that the death penalty is unconstitutional *per se* as petitioner would argue in effect. In fact, the Supreme Court has at all points specifically rejected this broad proposition, while, of course, also requiring that "if a state wishes to authorize capital punishment it has a constitutional duty to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1979) (Stevens, Stewart, Powell, Blackmun, JJ.). Petitioner's amendment is therefore denied on grounds of futility. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962).

With respect to the *pro se* amendment, it should be pointed out that petitioner's arguments relating to failure to request transcription of closing arguments and improper sentencing review were already before the Court. Petitioner's additional claims with respect to grand jury selection and change of venue are indeed points which were not raised at the state level, as petitioner's counsel has explicitly recognized. Memorandum of October 24, 1980, at p. 2, n.2. Counsel has also indicated that she does not propose to pursue these claims at present because of this failure to exhaust state remedies. *Id.* In view of this position and the fact that no substantial supporting basis for these allegations of error has been suggested in any event, the Court will grant respondent's motion to strike.

In sum, the Court concludes that no basis exists for substantial amendment of the present petition. This case has been pending for over two years. Counsel well-acquainted with all relevant facts narrowed the issues after a state evidentiary hearing which he in no way called into question. Not only has oral argument been held, but counsel has suggested a theory upon which this Court now grants substantial relief. In these circumstances, the Court concludes that to permit additional amendment would only promote delay and confusion. This Court finds further that no proper basis exists for considering petitioner's *pro se* amendment *insofar* as it states unexhausted claims, since counsel has effectively withdrawn these allegations in any event. Accordingly, this amendment shall be reviewed only to the extent that it restates points already presented and argued in this litigation. The Court will therefore consider the following matters: (1) whether the unavailability of closing arguments prevented constitutionally sufficient review of petitioner's sentence; (2) whether petitioner's guilty plea was in fact not made "knowingly and intelligently"; (3) whether petitioner was unaware of his right to withdraw his plea, all these errors being the result of ineffective assistance of counsel, and; (4) whether an adequate proportionality review was conducted by the Georgia Supreme Court.

Analysis

(1)

Petitioner attacks his conviction upon two grounds. It is alleged first that this plea was not intelligently and knowingly made. *Henderson v. Morgan*, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1975). Petitioner points out that, at the time of the sentencing hearing, in his description of the circumstances of the crime, Mr. Moore stated that he "didn't have no intention of killing him (Stapleton)." The indictment charged that Mr. Moore "unlawfully and with malice aforethought kill one Frodger Stapleton...." This language is derived from Ga.Code Ann. § 26-1101(a), which defines the crime of malice murder.[2] That code section provides in full as follows:

> A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

2. Some confusion appears to have developed at least in Mr. Bonner's mind as to whether petitioner was sentenced for malice murder or felony murder. This confusion is to be attributed in part to the fact that Mr. Moore was never sentenced for armed robbery, even though he was indicted for this offense and pleaded guilty to it. Such a situation would be typical of a felony murder, where the underlying offense merges with the homicide under Georgia law. *Woods v. State*, 233 Ga. 495, 212 S.E.2d 322 (1975). This Court will attempt no explanation of the trial court's failure to sentence for armed robbery. But, it is clear from the indictment that malice murder was the charge entered against the petitioner. It is also clear that the distinction here is largely technical, since, as Mr. Bonner stated before Magistrate Ford, "I don't believe there's any question that, if not malice murder, that the facts amount to felony murder."

Thus, petitioner contends that he was denied effective assistance of counsel in that he was not informed that the crime of malice murder required an intention to kill the victim. Petitioner contends further that he did not intend to kill Mr. Stapleton and, far from admitting this, he specifically denied such intent. Accordingly, he did not admit, or at least did not knowingly and intelligently admit, all the elements of the crime.

[21] Respondent disputes this argument based upon transcripts of the guilt and sentencing phases of trial as well as testimony received from petitioner and Mr. Pierce at the state habeas proceeding.[3] Respondent points out in particular that at the June 4, 1974 hearing when the guilty plea was received, it was established by direct inquiry of the trial court that petitioner had been apprised of the possible sentences to which his plea exposed him. At this hearing, petitioner also directly acknowledged that he had authorized Mr. Pierce to enter a plea of guilty and that he was in fact guilty as charged. Petitioner indicated that he was able to hear and understand the Court's inquiries, that he was not under the influence of any drug or narcotic and that his plea was not the product of threats, coercion, or promises of benefit. He stated that he understood his right to jury trial and his waiver of his right. Petitioner indicated that he had no witnesses to call in his behalf. He also indicated that he had conferred in detail with his attorney concerning the charges against him and the questions posed to him by the Court, and that he fully understood all matters. On the basis of these and other assurances, petitioner's plea of guilty was accepted, with sentencing postponed until the July hearing. *See Jones v. Wainwright*, 604 F.2d 414 (5th Cir. 1979); *Brown v. Jernigan*, 622 F.2d 914 (5th Cir. 1980).

In short, while it is true that the particular elements of the crimes charged were not individually addressed by the Court and the defendant, there appears to be no basis in the June record for concluding that petitioner was unaware of the nature of the crimes charged or equivocal in his acknowledgment of guilt as to those charges. Furthermore, no basis for such doubts can be found in the detailed testimony which was received from Mr. Pierce at the state habeas corpus hearing. At that proceeding, Mr. Pierce indicated that he was "still on Billy's side in this thing and I'm not trying to hurt him in any way." State Habeas Hearing, at 39. Nonetheless, he was unwilling to support petitioner's contention. Quite the opposite, Mr. Pierce stated as follows:

> Well, of course, I explained the elements of the crime to him, and I explained what would be necessary for the death penalty to be, to be imposed insofar as aggravating circumstances were concurred. I told him he had a right to a trial by jury. *Id.*, at 46.
>
> I explained to him everything I could think to explain to him, what his rights were, what the procedure would be or could be, and I can't think of anything I did not tell him, now.
>
> *Id.*, at 48. *See also Id.*, at 52.

Mr. Moore disputed this characterization of the extent of the advise and information he was afforded. State Habeas Hearing, at 16–17. But, nonetheless, it appears from both his answers to questions posed in open court and testimony from his attorney that he did in fact well know the nature of the charges against him. This conclusion is also supported by consideration of petitioner's background. He was a high school graduate with experience in law enforcement as a military policeman. He had also been selected for specialized training while in the military. Thus, there is no reason to believe that he was unable to comprehend either the importance or the meaning of the charges against him.

Furthermore, it appears that even if petitioner did not specifically state that he intended to kill Stapleton, there is sufficient

3. Evidence obtained at a post-conviction proceeding may serve to supplement the trial transcript in determining whether a plea was voluntarily made. *Fisher v. Wainwright*, 584 F.2d 691, 693 (5th Cir. 1978).

factual basis in the undisputed record to support, if not demand, such a conclusion. Mr. Moore stated that he had participated in the first entry of Stapleton's home as part of a plan which included murder. Petitioner's later return to the house can readily be seen as carrying forward this intent at least to the extent of exhibiting an "abandoned and malignant heart." Similarly, the fact that petitioner carried a deadly weapon for the specific, acknowledged purpose of meeting "opposition" can support an inference of malice. *See, e. g., Young v. The State*, 243 Ga. 546, 255 S.E.2d 20 (1979); *Chandle v. The State*, 230 Ga. 874, 198 S.E.2d 289 (1973).

[22, 23] In short, there is basis in the testimony of the petitioner at trial and Mr. Pierce thereafter as well as examination of the petitioner's background for concluding that he well understood the nature of the charges against him. There is also ample factual basis in the record to support a conclusion that the petitioner was in fact guilty of malice murder as defined under Georgia law.[4] In fact, the only point upon which any doubt at all may be founded is petitioner's statement at the time of sentencing concerning lack of "intent." However, upon reflection, even this slender evidence largely disappears. Considering the context in which it was offered—petitioner's obvious and understandable efforts to invoke the mercy of the Court—it seems clear that it was intended not as an unknowing repudiation of an element of the crime but a characterization of the degree of petitioner's culpability. Close examination demonstrates that petitioner did not say that he *never* intended to kill Stapleton, only that he had formed no such intent when he "left and went back over there." Under Georgia law, premeditation is not a specific element of malice murder. *Burnett v. State*, 240 Ga. 681, 242 S.E.2d 79 (1978). In fact, malice need not be formed until immediately prior to the slaying. *Dixon v. The State*, 243 Ga. 46, 252 S.E.2d 431 (1979). Far from denying malice immediately prior to firing his gun, petitioner's statement confirms that fired in direct, purposeful response to Stapleton's actions. Moreover, the mere fact that he fired not once but four or five times is sufficient to support an inference of malice. *Young v. The State*, 243 Ga. 546, 255 S.E.2d 20 (1979).

I do not question that some inquiry by the trial court into the meaning of petitioner's "denial" of intent would have been wise and useful in avoiding the extended discussion his statement has provoked in this case and the state habeas proceeding. See *Boykin v. Alabama*, 395 U.S. 238, 244, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1968). However, after examination of the factual record and the legal conclusions developed by the state habeas court, it is clear that petitioner has failed to overcome the presumption of correctness which normally attaches to state habeas proceedings. 28 U.S.C. § 2254(d). Even in the absence of this presumption, an independent examination of the record permits no other view.

Petitioner's remaining argument with respect to entry of his plea of guilty may be dealt with more summarily. Much as with the issue of intent, Mr. Moore contends that he was never made aware of his right under Georgia law to withdraw his plea at any time before filing of the sentence imposed by the trial court. Thus, petitioner argues that, had he been informed of this right, he would in fact have withdrawn his plea because he did not intend to kill Stapleton and

4. With specific reference to this matter, Mr. Pierce testified as follows:

> Q. (Mr. Bonner): Uh, do you recall telling him that his lack of a specific intent to kill Mr. Stapleton was, would not amount to any kind of defense?
>
> A. Well, I didn't think it would under what we had. Here's a man who's broken into somebody's home with a, a .38 caliber gun.

State Habeas, at 52.

Mr. Pierce's comment was with specific reference to the fact that felony murder was obviously an available charge even without intent, a point not disputed by Mr. Bonner. *See* note 2, *supra*. However, it makes clear that, by not raising the issue of intent, Mr. Pierce declined only a technical advantage. Of course, in so doing, he preserved petitioner's status as a cooperative, remorseful defendant. This Court can hardly find constitutional error in such a strategy.

he certainly did not wish to accept a sentence of death.

[24] Examination of the evidence on this question provides even less support for petitioner than in the case of his prior argument. The transcript of the June 4, 1974 hearing clearly shows that Mr. Moore was informed of his right to withdraw his plea at that time and receive a jury trial. Transcript, at 2. Again, there is no reason whatever to believe that petitioner was unable to understand the court's statement and to utilize the opportunity thus presented if he had so desired. Moreover, Mr. Pierce testified that he advised Mr. Moore fully on his right to withdraw his plea. State Habeas Hearing, at 48–49. Mr. Pierce also indicated that the trial court specifically confirmed that this advice had been offered by inquiry during a recess of the sentencing hearing. *Id.* Counsel further explained that the petitioner had specifically decided, upon his recommendation, not to withdraw the plea even if a death sentence were imposed:

> I felt that we were better to go ahead with the appeal on the one man imposing the sentence. This case had a lot of mitigating circumstances in it and I thought that they would be considered on, on the appeal.

Id., at 52. See also *Id.*, at 39.

Aside from petitioner's own testimony, there is simply no basis for concluding that he was unaware of his right to withdraw his plea. Far from representing ineffective assistance, the decision to proceed with appeal of the sentence of the trial court appears to be the reasoned conclusion of counsel facing a situation with no obvious or easy solution.[8] The Court finds no basis for concluding that this strategy was beyond the range of competent legal practice. Nor does the Court find any basis for concluding that this decision was made without the informed consent of the petitioner. The Court therefore sees no ground for relief in this contention.

8. Of course, for reasons which will be more fully developed shortly, this Court finds that Mr. Pierce's strategy ultimately affords the petitioner relief which would be at best far more difficult to sustain in the face of a jury verdict which carried no real explanation of the process by which sentence was arrived at.

(2)

Petitioner's two remaining arguments relate only to his sentence and particularly to the proportionality review accorded it by the Georgia Supreme Court. Petitioner contends first that, because closing arguments at sentencing were not transcribed, the Georgia Supreme Court lacks an adequate record by which to consider the propriety of the death penalty. This argument is considered at length in *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980). *Stephens* makes clear that, even in a capital case, the absence of transcribed closing arguments need not produce error of constitutional dimensions. Instead, the Court concludes that constitutional mandates are satisfied when the appellate court has a record sufficient to avoid "substantial risk" that the penalty would be inflicted in an arbitrary and capricious manner.

[25] Under the statutory mandates approved in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1975), the Georgia Supreme Court is specifically required

> to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases.

428 U.S., at 198, 96 S.Ct., at 2936. Thus, the question becomes whether the lack of transcribed closing arguments created "substantial risk" that these functions could not be discharged. Several factors convince the Court that no such risk was occasioned. Most important perhaps, this case does not involve a jury which might have been swayed by emotional appeals. Sentence was pronounced by the court, which can reasonably be expected to discount improper argument. Second, there is no suggestion made here that anything unusual or

improper occurred during these arguments. The Court's effusive praise of the defendant as one who "did everything that a man could do after you were caught and do an honorable thing", July 17, Hearing, at 54, hardly suggests that any improper attack on the petitioner had entered the Court's thinking. Third, the Georgia Supreme Court had the benefit of detailed reports on the defendant and the crime, as well as the trial court's own summary of the case available for consideration. Finally, the trial court, in passing sentence, placed on the record a statement detailing the facts of the case as well as other points which had guided the decision to impose the death penalty.

The presence of these many factors convinces this Court that the record as a whole adequately meets "the need for reliability in the determination that death is the appropriate punishment in [this] specific case," *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (Stewart, Powell, Stevens, JJ.), and that the capital sentencing procedures have been administered with an even hand. See *Gardner v. Florida*, 430 U.S. 349, 361, 97 S.Ct. 1197, 1206, 51 L.Ed.2d 393 (1976). It remains however to be determined whether in fact the Georgia Supreme Court's examination of petitioner's case meets the constitutional requirement that the death penalty not be applied arbitrarily and freakishly. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1971).

Before considering the question of whether petitioner's sentence was adequately reviewed, it will be useful to describe in some detail the reasoning through which it was apparently arrived at. Judge McMillan began his discussion of sentence by specific reference to the formal requirements of Georgia law. He found in particular that petitioner had committed a capital offense, malice murder, while in the commission of another capital crime, armed robbery. This finding was, of course, sufficient to support capital punishment under the Georgia requirement that at least one aggravating factor be present. Ga.Code Ann. § 27-2534.1(b).

However, Judge McMillan did not stop here. After this determination and imposition of the death penalty ostensibly based up it, the court made several comments which do much to illuminate the logic of its decision. Judge McMillan first described his impression of petitioner's conduct with respect to the crime:

> You, in my opinion, did everything that a man could do after you were caught and do an honorable thing insofar as your true statements made, your cooperation with the officials, pleading guilty to the mercy of the Court, and placing an awesome responsibility on me.
>
> July 17 Hearing, at 54–55.

Judge McMillan then went on to discuss his role in the sentencing process. In particular, the judge indicated that he viewed the problem of insuring that petitioner's sentence was proper as exclusively the task of the Georgia Supreme Court:

> [T]hey will take cases that have taken place in Georgia over a period of years and they will apply the facts to the case to the facts of other cases that have happened in Georgia, and then they will apply "evenhanded justice" to your case with other similar cases that have happened in Georgia. As to whether or not that actually applies in your case is for them to decide.
>
> *Id.*, at 55–56.

After this discussion and a further reference to mitigating circumstances which he found insufficient to "wipe out the aggravating statutory circumstances," Judge McMillan stated the specific basis of his conclusion:

> If we're going to philosophy about it, and if I'm permitted to do that, I'll do it. People in their homes—the most precious place a man can have—is his home; and to be in a home, and probably this man was asleep, I don't know, or for any person to be, not this man, but any person, to be asleep in his home, to be invaded by an intruder, that's armed with weapons, that's necessarily to kill (or otherwise the weapon wouldn't be there in the hands of

the intruder), is probably an invasion of the highest injustice that another can do. Now I can only imagine that anyone that is invaded by an intruder with an armed weapon, the fear that they must go through when they encountered in such a situation. So, I feel like that if the Court ever does require mandatory punishment—that is when they specify by law what offenses will have to be suffered by the electric chair—that one of these statutory offenses probably will be that when a person is robbed and killed in his home, that mandatory, as contrasted to discretionary, statutory aggravated circumstances will probably warrant the electric chair without life imprisonment. That justifies me in making the finding that I made.

July 17, at 56–57.

In summary, Judge McMillan nominally based his sentence upon a finding of one aggravating factor, as provided for under Georgia law. Ga.Code Ann. § 27-2534(b)(2). However, the court's remarks went considerably farther in specifying the logic behind this authorized but nonetheless highly discretionary judgment.[6] Judge McMillan specifically stated that the petitioner's conduct subsequent to his capture had been "everything that a man could do." Judge McMillan's comments are also notable for their silence on the subject of conduct prior to the murder which suggested that the petitioner was in some way more dangerous or reprehensible than the specific circumstances of the crime itself indicated. In short, Judge McMillan gave no indication whatever that there was anything special in the "character and propensities of the offender," *Gregg, supra*, 428 U.S., at 199, 96 S.Ct., at 2932, which would permit identifying him as one of "the few cases in which it (death) is imposed." *Furman v. Georgia*, 408 U.S. 238, 313, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 (White, J.).

It is apparent from Judge McMillan's remarks that the determining factor in his decision, the one fact that could not be "wiped out" was that Stapleton was "asleep in his home." Thus, in Judge McMillan's view, petitioner's crime was "the highest injustice that a man can do." Defendant's crime was in fact so heinous that the court believed it would support *mandatory* execution without consideration of mitigating factors: "That justifies me in the finding that I made."[7]

Judge McMillan's analysis does not merely specify the determining factor in the imposition of the death penalty. It also describes the court's notion of its role in the sentencing process. Judge McMillan indicates directly that his focus was entirely limited to the case at hand and his personal "philosophy" with respect to the facts of the crime. The court indicates directly that there has been no attempt whatever at "even handed justice." The court has only applied its own personal view of the overwhelming severity of the offense, while, of course, observing the necessity that statutory authorization for these preferences be invoked. Thus, Judge McMillan left it entirely up to the Supreme Court of Georgia to determine whether his personal view of the severity of the crime was the general view of judges and juries considering similar cases or merely "the whim of one man." *Furman, supra*, at 253, 92 S.Ct., at 2733 (Douglas, J.).

As I have already indicated, Georgia law imposes three requirements on the State

6. This Court has conducted a rough analysis of murder cases reported in the most recent complete volume of the Georgia Supreme Court Reporter (246 Ga. (1980)). Wide variations in the factual detail reported makes firm statistics impossible, but it appears that of the approximately forty cases, which were subjected to initial review, at least fourteen appeared to involve statutory aggravating circumstances. The death penalty had in fact been authorized in only six.

7. Of course, intervening decisions make clear that mandatory sentencing on this basis without reference to the character of the defendant is not constitutionally permissible. *See, e. g., Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1975). Therefore, to the extent that Judge McMillan may be seen as following a mandatory policy, petitioner's sentence would appear to be unconstitutional *ipso facto*.

Supreme Court in the sentencing review process. The court is required to determine: (1) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) whether the evidence supports the jury's finding of a statutory aggravating circumstance; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Ga. Code Ann. § 27-2537(c)(1-3). In the present case, there is no doubt that the trial court's finding of statutory aggravating circumstance was supported by the evidence. This Court's central concern is then the question of proportionality, i. e., whether "similar cases" have indeed produced similar punishment. Under the present facts at least, this test overlaps substantially with the companion requirement that "arbitrary factors" be isolated. In this case, the sentencing authority has directly stated that the controlling factor in his decision was the fact that the victim was accosted in his home. By examining sentencing patterns in this situation, one may determine whether indeed Judge McMillan's view of the gravity of petitioner's crime was an "arbitrary and capricious" analysis which produced a disproportionate sentence.

Thus, it is possible to outline the task of the Georgia Supreme Court in evaluating petitioner's sentence quite specifically. It is not so easy to describe the role of the federal court in reviewing this determination. The parties agreed during oral argument that the federal court's function was set out by the decision of the Fifth Circuit in *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978). In *Spinkellink*, the court rejected petitioner's demand that an essentially *de novo* proportionality review be carried out in the habeas proceeding. Instead, the court held that where there is no reason to believe that sentencing review has not followed statutory mandates, the federal tribunal generally should not inquire into whether the state court had reached an arbitrary result in a particular case.

> If a state has such a properly drawn statute—and there can be no doubt that Florida has—which the state follows in determining which convicted defendants receive the death penalty and which receive life imprisonment, then the arbitrariness and capriciousness condemned in *Furman* has been conclusively removed.
>
> 578 F.2d, at 605 (footnote omitted).

Thus, it appears that the federal role typically should be limited to review of whether the formal requisites of a capital statute have been observed, without reference to the results actually arrived at. This view is, of course, a reflection of the court's extreme reluctance "continuously to question every substantive decision of the Florida criminal justice system with regard to the imposition of the death penalty." 578 F.2d, at 604. However, the court does not stop here. Despite the general prohibition on case-by-case review,

> [t]his is not to say that the federal judiciary should never concern itself on habeas corpus review with whether section 921.-141 is being applied arbitrarily and capriciously. If a petitioner who has been sentenced to death can show that the facts and circumstances of his case are so clearly undeserving of capital punishment that to impose it would be patently unjust and would shock the conscience . . . then federal court intervention, might be warranted.
>
> 578 F.2d, at 606, n.28.

Thus, *Spinkellink* suggests in essence a two-step analysis. The federal tribunal is mandated first to consider whether the state courts have in fact followed the requirements of a constitutionally drawn statute, such as Georgia, of course, has. *Gregg*, supra. If it appears that the state has followed this statute, then scrutiny is limited to cases where the result reached is so extreme as to "shock the conscience." By implication at least, *Spinkellink* also suggests that where it appears that the state tribunal has *not* met its responsibilities adequately, the federal role does indeed increase substantially, perhaps rising even to the *de novo* review sought by the petitioner here.[*]

This interpretation of the federal role with respect to appellate proportionality review seems generally in accord with the intervening United States Supreme Court decision in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1979). In *Godfrey*, the Supreme Court considered Georgia appellate processes with respect to capital sentences imposed on the basis that the crime was "outrageously or wantonly vile, horrible, or inhuman in that it involves torture, depravity of mind, or an aggravated battery to the victim." Ga.Code Ann. § 27-2534.1(b)(7). The exact nature of this examination is not easily described. It appears that *Godfrey* can be characterized as a finding that "a majority of this court disagrees" with the conclusion of the Georgia Supreme Court that "facts supported the jury's finding of the existence of statutory aggravating circumstance § b(7)." 446 U.S., at 449, 100 S.Ct., at 1776 (White, J. dissenting). On the other hand, the court's conclusion may be seen as resting on the failure of the Georgia court to define b(7) with sufficient clarity:

> [T]he question is whether the court below has adopted so ambiguous a construction of the relevant provision that the universe of cases that it comprehends is impermissibly large, thus leaving undue discretion to the decisionmaker and creating intolerable dangers of arbitrariness and caprice. .
>
> 446 U.S., at 435, n.1, 100 S.Ct., at 1768, n.1 (Marshall, J., concurring).

However, this Court finds it unnecessary to choose between these characterizations. Instead, it appears that both are essentially correct. The Court in its initial analysis does indeed consider whether b(7) is impermissibly vague. Thus, the Court finds that the statutory language "standing alone" provides no

> inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman' . . . . The standardless and unchanneled imposition of death sentences in the unconstrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmance of those sentences by the Georgia Supreme Court.
>
> 446 U.S., at 428-29, 100 S.Ct., at 1765.

Having determined first that the Georgia Supreme Court's review process did not adequately discharge the statutory and constitutional duty to construe b(7) so as to channel jury discretion, the Court moves to a more substantive inquiry:

> Thus, the validity of the petitioner's death penalty turns on whether, in light of the facts and circumstances of the murders that Godfrey was convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the phrase "outrageously or wantonly vile, horrible or inhuman in that [they] involved . . . depravity of mind. . . ."
>
> 446 U.S., at 422, 100 S.Ct., at 1767 (footnote omitted).

The Court quickly determines that "petitioner's crimes cannot be said to have reflected consciousness materially more 'depraved' than that of any person guilty of murder." 446 U.S., at 432-33, 100 S.Ct., at 1767. The petitioner's case is thus held to be indistinguishable from the many cases in which the death penalty was not imposed. Accordingly, his death sentence is reversed.

To be sure, this analysis has been subjected to serious criticism along much the lines suggested in *Spinkellink*. Thus, Justice White describes the court as assuming "the role of a finely tuned calibrator of depravity, demarcating for a watching world the various gradations of dementia that lead men and women to kill their neighbors." 446 U.S., at 454, n.8, 100 S.Ct., at 1779, n.6 (White J., dissenting). However, it appears from *Godfrey* as well as *Spinkellink* that the role of the federal tribunal does indeed involve the two-fold task of assessing first whether the state court has properly discharged its statutory and, hence, constitutional duty. Where that task has not been fulfilled, the federal court has the second responsibility to weigh the facts at hand to

determine whether the death penalty may be applied under any constitutional application of the statute in question. Finally, under *Spinkellink*, the federal court has the further duty to determine whether a death sentence imposed under apparently proper procedures is nonetheless so extreme and disproportionate as to "shock the conscience."

In the present case, the statutory duty of the Georgia Supreme Court has already been delineated. The Georgia court, in pertinent part, is mandated to determine whether petitioner's sentence is appropriate to his crime by considering "the penalty imposed in similar cases, considering both the crime and the defendant." Ga.Code Ann. § 27-2537(c)(3). However, determining what constitutes an appropriate sample of "similar cases" need not be any simple task. To a degree perhaps unequaled in any other area of law, capital cases appear to implicate the perspectives and attitudes of the individual reflecting upon them. Thus, even in the basic statement of a case, enormous differences may appear in the way observers characterize relevant facts and circumstances. These differences can surely have much significance for, how and against what other "similar cases" a particular crime and criminal are considered.[8]

However, in the present case, it is unnecessary to speculate on what factors are to be considered in sentencing review. Because Judge McMillan specifically outlined the basis of his judgment, the Georgia Supreme Court was provided with a clear basis for determining what cases could be considered "similar" for purposes of their comparison.

The fact that petitioner was sentenced to death despite affirmative indication that his conduct after the crime had been exemplary as well as at least the implied conclusion that his background was also a factor in mitigation, clearly demanded that the Geor-

8. Thus, in *Godfrey*, the plurality characterizes "the crime and the criminal" as follows:

> The victims were killed instantaneously. They were members of his family who were causing him extreme emotional trauma. Shortly after the killings he acknowledged his responsibility and the heinous nature of his crimes.

In dissent, Justice White develops the same facts in part as follows:

> [p]etitioner, in a coldblooded executioner's style, murdered his wife and his mother-in-law and, in passing, struck his young daughter on the head with the barrel of his gun . . . Petitioner's wife lay prone on the floor. Mrs. Godfrey's head had a hole described as 'approximately the size of a silver dollar' on the side where the shot entered, and much less decipherable and more extensive damage on the side where the shot exited. Tr. 239. Pellets that had passed through Mrs. Godfrey's head were found embedded in the kitchen cabinet.
>
> 446 U.S., at 448, 100 S.Ct., at 1773.

Of course, both of these views are entirely in accord with the facts presented. Yet, they clearly show very substantial differences of definition which must be reflected ultimately in the process and outcome of review. Thus, for example, the plurality quickly dismisses the fact that the victims here were horribly mutilated by the shotgun blasts which killed them. The opinion states only that, since they were killed instantly,

> it is constitutionally irrelevant that the petitioner used a shotgun instead of a rifle as the murder weapon, resulting in a gruesome spectacle in his mother-in-law's trailer. An interpretation of § (b)(7) so as to include all murders resulting in gruesome scenes would be totally irrational.
>
> 446 U.S., at 433, n.16, 100 S.Ct., at 1767, n.16.

However, Justice White, in dissent, finds these facts at least highly suggestive of petitioner's "depravity of mind." The plurality Justice White concludes, "ignores the obvious correlation between gruesomeness and "depravity of mind," between gruesomeness and "aggravated battery," between gruesomeness and "horrible," between gruesomeness and "vile," between gruesomeness and "inhuman." Even if these relationships are not in fact "obvious" as Justice White suggests, it is obvious that they highlight conflicts in the personal perspectives of observers which have little or no "legal" component. Certainly they reflect differences which cannot be resolved by any process of legal analysis, yet they go far toward determining legal results. Of course, such differing views of factual matters are hardly unusual in the law. Indeed, the jury system itself is obviously in no small part an effort to temper and control such widely and commonly varying perspectives. What is highly novel is the Supreme Court's requirement that these widely varying perspectives and equally variable characterizations of crimes and criminals nonetheless ultimately produce some rational, discoverable sentencing pattern.

gia Supreme Court closely test Judge McMillan's view that intrusion into a private home was *ipso facto* sufficient to demand capital punishment when the resident was killed. Moreover, because Judge McMillan clearly defined his duty as limited to expressing a personal view of the crime without reference to questions of "even-handed justice," the Georgia Supreme Court bore a special burden. It was particularly incumbent upon that court to insure that Judge McMillan's view was not the arbitrary judgment of one individual. It was particularly important for the Georgia court in fact to examine other cases where homes were burglarized and the residents killed to determine whether such conduct had in fact brought the death penalty with some discernable regularity even in the presence of mitigating circumstances.

Examination of the cases cited by the Georgia Supreme Court in its sentencing review clearly demonstrates that it did not in fact consider "similar cases." In the Appendix to its ruling, the Georgia court lists twenty-three cases which were considered on the basis of "similarity" to the petitioner's crime. In fact, it appears that only three of these cases involved victims who were attacked in their homes. *Creamer v. State*, 232 Ga. 136, 137, 205 S.E.2d 240 (1974); *Pass v. State*, 227 Ga. 730, 182 S.E.2d 779 (1971); *Allen v. State*, 231 Ga. 17, 200 S.E.2d 106 (1973). Furthermore, only one involved imposition of the death penalty, which is hardly suggestive of any particular sentencing pattern.

Examination of even the most basic facts of these cases reveals little, if any similarity to petitioner's crime. *Creamer* involved the torture and murder of two doctors who were also husband and wife. The defendant along with two others waited outside the home of the two victims. When the first emerged from the door to go to his car, he was attacked and shot by Creamer. He was then beaten about the head, carried out into the driveway and shot again. The second victim attempted to come to his aid. She fired at the attackers, but she was eventually seized by them, shot through each arm, taunted, and finally killed with a gunshot from another of the assailants as she lay face down on her own patio. Despite four prior felony convictions and his being over forty years old, this defendant received only a life term for his crimes.

Allen involved a crime spree during which the defendant had first stolen a car and then obtained two pistols in separate burglaries committed while he drove north from Atlanta toward Greenville, S.C. While still on this route, the defendant broke into a third home. This time the residents, an elderly couple, were present. They were awakened by Allen when he fired a shot to blow off the lock on the rear door. Defendant shot and killed both when they came to investigate. He then ransacked their home before continuing on his way. After at least one other crime, the theft of a second car, he was apprehended and confessed. Despite being forty-two years old and having a lengthy history of prior offenses, including several felonies, Allen was sentenced to life imprisonment.

Pass is the only case where a death sentence was in fact imposed. There the defendant broke into a home and ransacked it, stealing a variety of items. The defendant was surprised by the residents in the midst of his crime. Both the victims, husband and wife, were found shot through the head. The husband's head was lacerated, apparently as a result of having been beaten with a baseball bat which was found nearby. There was no evidence of prior convictions, but defendant repudiated his confession and offered an alibi defense at trial. The only evidence of mitigating circumstances was a defense claim that the defendant was mentally retarded.

Distasteful as this exhibition of horrors certainly is, it nonetheless establishes beyond serious doubt that the virtual *per se* rule which Judge McMillan declared as his rationale in the present case has not been followed in Georgia with respect to crimes which were in many significant ways vastly more reprehensible than petitioner's. This Court would attempt no logical distinction between the results reached in *Creamer*,

Allen and *Pass*, if in fact any real differences can be noted at all. But, it appears entirely obvious that all three are far different from the present case with respect to both crimes and defendant. In no way do they support the result reached by Judge McMillan. Quite the opposite, they compel the conclusion that petitioner's sentence is not appropriate.

[26] Thus, this Court concludes that, in reviewing petitioner's sentence, the Georgia Supreme Court did not confine itself to "similar cases" as required by statute. Twenty of the twenty-three cases which were considered did not resemble the present facts sufficiently to provide any useful comparison to the sentence imposed here. Of the remaining three, only one resulted in a death sentence despite the fact that all were substantially more reprehensible than the present case when considered from the point of view of both the crime and the defendant. These three cases clearly suggest that Judge McMillan's "philosophy" with respect to the sanctity of the home is not reflected in Georgia sentencing policy generally. It appears to be merely an arbitrary factor which cannot effectively "distinguish this case in which the death penalty was imposed, from the many cases in which it was not." *Godfrey, supra*, 446 U.S., at 433, 100 S.Ct., at 1767.

An extensive search for other cases which might support the determination of the Georgia Supreme Court lends further support to the conclusion suggested by *Pass*, *Creamer* and *Allen*. Thus, in *Hill v. State*, 237 Ga. 794, 795, 229 S.E.2d 737 (1977), the death penalty was imposed and affirmed with respect to the robbery of a home and murder of the person who resided there. However, this sentence was based, not on robbery, but on a finding that the crime was "outrageously vile...." This finding was supported by evidence

> that the victim was held down on his couch, viciously beaten and stabbed while his home was being looted and subsequently had his throat cut in another room of his home where he had sought refuge.

237 Ga., at 802, 229 S.E.2d 737.

There is no indication whatever in this opinion that the mere fact that a home was the situs of the crime was or could have been viewed as sufficient to support the death penalty. Certainly, there is no similarity whatever in the circumstances of this brutal torture murder and the crime committed by petitioner here. Yet, the Georgia court cited not only *Pass* but *Moore* in its listing of "similar cases."

In *Berryhill v. State*, 235 Ga. 549, 221 S.E.2d 185 (1975), a death sentence was upheld, but only where the defendant had "a long history of psychological problems and a lengthy prior criminal record." 235 Ga., at 549, 221 S.E.2d 185. Moreover, his crime involved a calculated, sadistic attack on the victim in his home:

> As Hooks fled up the stairs, defendant shot him twice in the legs; then, followed him upstairs and shot him a third time through a closed bedroom door. Defendant shot Hooks twice more; the fifth shot was through the head while Hooks lay on the floor of his daughter's bedroom.

Id. Again there is obviously no real similarity between this case and petitioner's. Moreover, there is no basis in the case for concluding that the site of the crime and not the extraordinary cruelty it certainly reflected was controlling. In fact, any thought that location alone was determinative seems entirely untenable in view of the fact that Berryhill's companion, who was not the "triggerman," received only a life sentence. *Lane v. The State*, 238 Ga. 407, 233 S.E.2d 375 (1977).

Other cases might be cited where murders committed in the course of burglary of a home produced the death penalty, but only under circumstances far more extreme than are present here. *See, e. g., Coleman v. The State*, 237 Ga. 84, 85, 226 S.E.2d 911 (1976) (the Alday murders). The Court is aware also of one case where less severe circumstances produced only a life sentence. See *Johnson v. The State*, 232 Ga. 61, 205 S.E.2d 190 (1974). But, in no wise, has this Court been able to locate a single "residential murder" involving substantial mitigat-

ing circumstances and no aggravating factors in the manner of the crime, where the defendant received a death sentence. Quite the opposite, even before Judge McMillan, in Jefferson County at the approximate time of petitioner's crime, juries did not uniformly impose death for murders which were obviously far more horrible than Mr. Stapleton's. Thus, in *Birt v. State*, 236 Ga. 815, 225 S.E.2d 248 (1976), death was imposed for the brutal torture murder of an elderly couple in their home. Another jury likewise returned a death sentence for a second participant in the crime. *Gaddis v. The State*, 239 Ga. 238, 236 S.E.2d 594 (1977). Nonetheless, the third participant was given only a life term despite the fact that "[t]he same witnesses testified in this case for the state as testified in Birt's trial. The evidence was the same...." *Reed v. The State*, 238 Ga. 457, 233 S.E.2d 369 (1977).

Consideration of one additional Georgia case reinforces this Court's conclusion and, in fact, compels the view that, even under a "shock the conscience" test, petitioner's death sentence cannot stand. *Furman* is, of course, the case which established the constitutional requirement that juries be guided in their decisions with respect to capital punishment. *Cf. McGautha v. California*, 402 U.S. 183, 198, 91 S.Ct. 1454, 1462, 28 L.Ed.2d 711 (1970). The facts in *Furman* were set out as follows:

> The victim surprised Furman in the act of burglarizing the victim's home in the middle of the night. While escaping, Furman killed the victim with one pistol shot fired through the closed kitchen door from the outside. At the trial, Furman gave his version of the killing:
>
> "They got me charged with murder and I admit, I admit going to these folks' home and they did caught me in there and I was coming back out, backing up and there was a wire down there on the floor. I was coming out backwards and fell back and I didn't intend to kill nobody. I didn't know they was behind the door. The gun went off and I didn't know nothing about no murder until they arrested me, and when the gun went off I was down on the floor and I got up and ran. That's all to it." App. 54–55.
>
> The Georgia Supreme Court accepted that version:
>
> "The admission in open court by the accused ... that during the period in which he was involved in the commission of a criminal act at the home of the deceased, he accidentally tripped over a wire in leaving the premises causing the gun to go off, together with other facts and circumstances surrounding the death of the deceased by violent means, was sufficient to support the verdict of guilty of murder...."
>
> *Furman v. State*, 225 Ga. 253, 254, 167 S.E.2d 628 (1969).

408 U.S., at 294, n.48, 92 S.Ct., at 2754, n.48. (Brennan, J. concurring). Considering these facts, and only very sketchy mitigating circumstances, Justice Brennan wrote that "[i]f, for example, petitioner Furman or his crime illustrate the 'extreme,' then nearly all murders and their murderers are also 'extreme.'" 408 U.S., at 294, 92 S.Ct., at 2754 (footnote quoted above). *See also* 408 U.S., at 313, 92 S.Ct., at 2764 (Stewart, J., concurring).

Of course, in *Furman*, the court found that "imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 408 U.S., at 239–40, 92 S.Ct., at 2727 (*per curiam*). While the facts in *Pass*, *Allan* and *Creamer* bear little similarity to the present case, *Furman* obviously displays many striking parallels. Only Furman's claim of "accident" might distinguish his crime from the present facts, but such a distinction hardly goes far in light of the undisputed evidence that petitioner fired out of a mixture of fear and intoxication *after* his victim had first fired at him. Thus, it appears to this Court that the present facts are substantially indistinguishable from the very situation which led the Supreme Court to find the death penalty as then applied unconstitutional. To be sure, the law under which Mr. Moore was convicted was constitutional on its face. *Gregg*, su-

pra. But, the result here reached, even if it were based upon proper statutory procedures, is no better. To permit petitioner to be executed in these circumstances would indeed "shock the conscience."

Conclusion

For the reasons set out above, this Court concludes that petitioner's plea and sentencing were carried out in proper accord with constitutional mandates. However, the Court concludes also that constitutional mandates were not observed in appellate review of this sentencing. The Court further determines that petitioner's sentence of death cannot be sustained in light of any proper sentencing review and the holding of the United States Supreme Court in *Furman*. Petitioner's sentence is therefore vacated. He is hereby remanded to the Superior Court of Jefferson County for further proceedings not inconsistent with this opinion.

APPENDIX

I

Debate over the proper statutory and procedural means for imposition of capital punishment long antedates even the discovery of America.[1] Echoing Exodus 21:12–13, the laws of Alfred provided:

> Let the man who slayeth another willfully perish by death. Let him who slayeth another of necessity or unwillingly, or unwillfully, as God may have sent him into his hands, and for whom he has not lain in wait be worthy of his life and of lawful but if he seeks an asylum.

Quoted in 3 J. Stephen, History of the Criminal Law of England 24 (1883). The statute of Gloucester, 6 Edw. 1, c.9 (1278), provided that in cases of self-defense or misadventure the jury should neither convict nor acquit, but should find the fact specially, so that the King might decide to offer a pardon, as he generally did in such situations. Indeed, the familiar if hardly simple concept of "malice aforethought" emerged in the sixteenth century as yet another attempt to separate homicides which merited capital punishment from others which did not. 3 *Id.*, at 46–73.

This development did not cease in America. The early history of this country reflects a broad aversion to the common-law rule which imposed a mandatory death sentence on all convicted murderers. In 1794, Pennsylvania abolished capital punishment except for "murders of the first degree," which included all "willful, deliberate, and premeditated" killings, and for which death remained mandatory. Pa.Laws 1794, c.1777. Virginia and many other states adopted similar reforms thereafter. Nonetheless, they, like the notion of malice aforethought, proved inadequate. Notions of "degree" of fault soon became little more than "mystifying cloud(s) of words." B. Cardozo, What Medicine Can Do For Law, In Law And Literature 70, 100 (1931). Moreover, juries often simply refused to follow these statutes in situations where capital punishment was clearly required but it was nonetheless considered inappropriate for one or another reason. *See Andres v. United States*, 333 U.S. 740, 753, 68 S.Ct. 880, 886, 92 L.Ed. 1055 (1948) (Frankfurter, J., concurring).

This problem of jury nullification might have been met by increasingly specific statutory guidance. However, legislatures did not follow this course. Instead, the general response was to explicitly grant juries the discretion they already exercised in fact. *See* Knowlton, Problems of Jury Discretion in Capital Cases, 101 U.Pa.L.Rev. 1099, 1102 and n.13 (1953). In 1897, federal law was changed to reflect this view. Act of Jan. 15, 1897, c.29, § 1, 29 Stat. 487. Thus, in *Winston v. United States*, 172 U.S. 303, 19 S.Ct. 212, 43 L.Ed. 456 (1899), the Supreme Court considered whether a federal jury should be required to find mitigating circumstances before it could return a recommendation of mercy. The court concluded that such a requirement would conflict with legislative intent that the sentencing deter-

1. The historical analysis developed below has been drawn largely from *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1970).

APPENDIX—Continued

mination should be left exclusively to the jury:

> How far considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone. 172 U.S., at 312, 19 S.Ct., at 215. *See also, Andres, supra*, 333 U.S., at 743, 68 S.Ct., at 881.

Finally, in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the court offered a more general discussion of the role of the jury in death cases. The court observed that, in capital proceedings, juries "do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death." *Id.*, at 519, 88 S.Ct., at 1775 (footnote omitted). The jury's main function and value was thus defined as "to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" *Id.*, at 519 n.15, 88 S.Ct., at 1775 n.15 (citation omitted).

II

The problem of jury discretion in capital sentencing is then anything but new. Moreover, it is not a novel problem for the judiciary. Constitutional challenges to jury discretion date from at least the *Winston* decision in the late nineteenth century. However, recent decades have brought a new perspective to this ancient struggle between specifying law and jury discretion. Whereas law was once seen as a means to force reluctant juries to do their duty and impose capital sentences, more recently law has emerged as a favored means to control juries which were considered too ready to impose death. Thus, in *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1970), the court considered whether the "untrammeled discretion" of the trier of fact was so "fundamentally lawless" as to deprive the accused of life without due process. Writing for the court, Justice Harlan first noted the many lower courts which had considered and uniformly rejected such arguments. 402 U.S. 196, n.8, 91 S.Ct. 1461, n.8. Noting further that "a strong showing [is required] to upset this settled practice of the nation on constitutional grounds," *Id.*, at 203, 91 S.Ct., at 1465, Justice Harlan went on to conclude that statutory control of jury discretion was neither constitutionally mandated nor practically possible:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty and to express those characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.
>
> In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.
>
> The infinite variety of cases and facets to each case would make general standards either meaningless 'boilerplate' or a statement of the obvious that no jury would need.

Id., at 204, 207, 208, 91 S.Ct., at 1465, 1467.

McGautha is, however, notable also as an exposition of the contrary view. Thus, Justice Brennan, in a dissent joined by Justices Marshall and Douglas, concluded that the Constitution did not permit

APPENDIX—Continued

> capital sentencing procedures that are purposely construed to allow maximum possible variation from one case to the next, and provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice.
>
> *Id.*, at 248, 91 S.Ct., at 1487.

Describing existing procedures as the "unguided, unbridled, unreviewable exercise of naked power," Justice Brennan opined that state law was constitutionally required to provide guidelines sufficient to control the "arbitrary and capricious" exercise of sentencing power. Drawing on a variety of cases, several dealing with state administrative actions, Justice Brennan concluded that

> State procedures are inadequate under the Due Process Clause unless they are designed to control arbitrary action and also to make meaningful the otherwise available mechanism of judicial review. *Id.*, at 268, 91 S.Ct., at 1498.

Of course, it is this latter view which prevailed only a year later in *Furman, supra*. In fact, the language such as that quoted above from *McGautha* has become a staple of the many more recent Supreme Court considerations of capital punishment. For example, in *Godfrey*, the plurality opinion notes that state statutes

> must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process of imposing a sentence of death.' 446 U.S., at 428, 100 S.Ct., at 1764. *See also Gregg, supra*, 428 U.S., at 195, n.45, 96 S.Ct., at 2935, n.45 (Stewart, Powell, Stevens, JJ.).

Thus, for approximately the last decade, the Supreme Court has mandated a process of statutory development designed to achieve what *McGautha* found "beyond present ability." If the states are to have capital punishment at all, they must develop procedures which make it "regular and reviewable," so as to provide a "meaningful basis for distinguishing the few cases in which [the] penalty is imposed from the many in which it is not." *Furman, supra*, at 313, 92 S.Ct., at 2764.

III

As was noted initially, the passage of now approximately a decade since *Furman* and the specific facts of *Blake, Burger*, and *Moore* seem to this Court to provide a useful occasion for considering whether recent Supreme Court decisions have led to state laws which do promote rational jury decisions and effective appellate review, instead of the "meaningless boilerplate" or bromides which Justice Harlan warned against. More particularly, they provide an important opportunity for considering the developing role of the judiciary, state and federal, in administering these new statutory attempts to meet the requirements suggested in *McGautha* and announced in *Furman*.

Furman and its progeny may be seen as mandating, in effect, three levels of constitutional protections for the accused in a capital case. There is, of course, in the first place, the broad "umbrella" of due process which is accorded any defendant in criminal proceedings. Thus, this Court considered in *Blake* whether the constitutional guarantee of the assistance of counsel was violated by a trial in which sanity was the major issue and yet little, if any, competent expert testimony was received. In this context, the Court was, of course, not limited to considering only capital cases. In fact, many of the decisions which were relied upon did not involve the death penalty. *See, e. g., Bush v. McCollum*, 344 F.2d 672 (5th Cir. 1965). The fact that a capital sentence was at issue might properly have figured in the Court's evaluation of questions such as whether error is to be considered harmless, but it obviously did not create the rights under discussion.

There is, of course, no disagreement as to the propriety of judicial supervision in such matters as these. Whatever one's evaluation of the constitutional requirements for capital punishment, no one doubts that the courts must "insure that the rights of a defendant are scrupulously respected," and, that in capital cases particularly, the courts "must see to it that the jury has rendered

APPENDIX—Continued

its decision with meticulous care." *Godfrey, supra*, 446 U.S., at 443, 100 S.Ct., at 1772 (Burger, C. J., dissenting). Serious controversy develops only when one moves beyond the broad protections due criminal defendants generally to the far more specific and far less commonplace procedural and substantive considerations mandated by *Furman* and succeeding cases. Here one reaches the exceedingly difficult problems of statutory construction discussed in *McGautha*. One also confronts the still more difficult question of whether the "rational review" process mandated by *Furman* can be seen as improving on initial jury determinations or merely "second-guessing" them. *See Godfrey, supra*, at 451, 100 S.Ct., at 1776 (White, J., dissenting).

This Court has now had occasion to consider the first of these twin concerns in the specific context of *Burger*. Of course, after *Gregg* there is no doubt that the Georgia statute is facially constitutional under the mandates of *Furman*. There is, however, much room for doubt as to whether this statute in fact escapes the problems foreseen in *McGautha*. In *Gregg*, the plurality described the benefits of the Georgia statute as follows:

> No longer can a Georgia jury do as Furman's jury did .... Instead, the jury's attention is directed to the specific circumstances of the crime: Was it committed in the course of another capital felony? Was it committed for money? Was it committed upon a peace officer or judicial officer? Was it committed in a particularly heinous way or in a manner that endangered the lives of many persons? In addition, the jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that might mitigate against imposing capital punishment (e. g., his youth, the extent of his cooperation with the police, his emotional state at the time of the crime).

428 U.S. at 197, 96 S.Ct., at 2936 (Stewart, Powell, and Stevens, JJ., citing *Moore v. State*, 233 Ga. 861, 865, 213 S.E.2d 829 (1975)).

This limited analysis is at best disturbing. The announced purpose of *Furman* was, after all, to separate those few who deserved capital punishment from the many, including, of course, Mr. Furman, who did not. Nonetheless, the Court is all but silent on how a very broad, general listing of factors such as the Georgia statute might promote, much less produce "rational" results. Such a conclusion is hardly obvious in light of the fact that Furman himself would readily qualify for execution because his homicide was committed in the course of a capital crime, armed robbery. Similarly, there is no suggestion as to how or why isolating the jury's attention on a factor like greed (murder "committed for the purpose of receiving money or any other thing of monetary value," Ga.Code Ann. § 27-2534.1(b)(4)), would tend to separate the deserving from the undeserving. Again, Mr. Furman might be said to merit death by this criteria, even though *Furman* holds such a sentence unconstitutional based on a record which specifies few, if any, mitigating circumstances in the character of the defendant. *Furman, supra*, 408 U.S., at 294, n.48, 92 S.Ct., at 2754, n.48 (Brennan, J., concurring).

Consideration of remaining aggravating factors under the Georgia statute does nothing to alleviate these doubts. Thus, one finds that the first aggravating factor under the statute ("the offense ... was committed by a person ... who has a substantial history of serious assaultive criminal convictions") was declared unconstitutionally vague by the Georgia Supreme Court. *Arnold v. State*, 236 Ga. 534, 540, 224 S.E.2d 386 (1976). Obviously, then, no guidance can be found in it. It is only a little less difficult to see how the fact that a homicide was committed "in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person," § 27-2534.1(b)(3), can be seen as "rationally" directing a jury where the statute does not similarly list the killing of more than one person as an ag-

APPENDIX—Continued

gravating factor. Indeed, the proposition that two murders are generally worse than one would seem utterly unassailable, but it is curiously absent from the Georgia statute.[3]

The remaining factors seem no more helpful. Only (b)(7), which has already been discussed at length, and (b)(6), which describes murder by means of or in the role of an agent, do not relate specifically to homicides committed against judicial or police officials, or by an escaping criminal. Of course, (b)(7) was held in *Godfrey* to provide effectively no guidance for a jury. Section (b)(6) may be seen as more specific but it would surely prove inapplicable to many crimes as would factors relating to homicides by escapees or against public officials. At best, these guides would seem to provide only limited assistance in some quite possibly small number of factual contexts.

In light of all these problems, it is perhaps not surprising that the endorsement of the Supreme Court was less than ringing:

> While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that can be fairly called capricious or arbitrary.

428 U.S., at 194-95, 96 S.Ct., at 2935 (Stewart, Powell, and Stevens, JJ.).[3] Thus, the Court appears to find the Georgia statute better than nothing at all. Nonetheless, this Court must seriously wonder whether the Georgia statute in fact amounts to more than a mere random enumeration of factors, which would be entirely inapplicable in many arguably extreme cases and entirely obvious in others.[4] Certainly, there would seem to be nothing particularly novel or interesting in a statutory requirement that the crime and the criminal be considered by a sentencing jury. Such an admonition forbids only mandatory sentencing. It does not in any apparent way prevent or control the problem of arbitrary imposition of the death penalty. Indeed, it would appear that these broad, overlapping factors would not merely authorize but invite imposition of the death penalty in many cases where an undirected jury would be most reluctant to impose death. Of course, this view is consonant with the historical fact that statutory formulations have generally included many more cases than juries have been willing to recognize.

IV

Whatever the possible benefits of these statutory instructions standing alone, they must ultimately be considered in the light of the third level of protection afforded the accused under *Furman*: appellate review of the decision to impose the death penalty. Much as with the statutory aggravating circumstances, *Gregg* finds cause for comfort in the Georgia provision for automatic review by the State Supreme Court:

> That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance,

3. Some states do in fact make multiple murder an aggravating factor as such. Interestingly, had Georgia followed this policy, the problem of (b)(7) might not have arisen in *Godfrey*, 446 U.S., at 432, n. 15, 100 S.Ct., at 1767, n. 15. This Court particularly questions the "rationality" of a statute which so easily supports Furman's sentence for an "accidental" killing, yet cannot constitutionally reach the "hideous" double murder about which Godfrey declared, "I have been thinking about it for eight years . . . I'd do it again." 446 U.S., at 426, 100 S.Ct., at 1763.

3. This quotation relates specifically to a set of factors developed by ALI for the Model Penal Code (Tent.Draft No. 9, 1959). However, it would seem applicable to the Georgia statute, which is similar in many respects. See 428 U.S., at 193, n. 44, 96 S.Ct., at 2934, n. 44.

4. There is no doubt that the court recognized that this problem might exist:

> A system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur.

428 U.S., at 195, n. 46, 96 S.Ct., at 2935, n. 46. Nonetheless, the Court does not much consider whether the Georgia statute fails on this account.

APPENDIX—Continued

and whether the sentence is disproportionate compared to those sentences imposed in similar cases ... [T]o guard against a situation comparable to that presented in *Furman*, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate.

428 U.S., at 198, 96 S.Ct., at 2937 (Stewart, Powell, Stevens, JJ.). The Supreme Court thus concludes that the Georgia procedures are constitutional "on their face."

This Court has already touched on the enormous problems inherent in review of "similar cases" in *Moore*. As I indicated there, it is no simple task to identify what cases are in fact "similar" for purposes of sentencing review. Because the trial judge was extraordinarily careful to note explicitly the basis of his determination, it was possible in *Moore* to classify that case as a "residential murder" and to compare it with other cases accordingly. Obviously, had this guidance been unavailable, as it would be with any jury, no court could have said with assurance that the site of the crime was controlling. It would have been possible only to consider Mr. Moore's case in some much more general context, with a result that might or might not have been the same.

This problem is obviously very broad. The state tribunal is commanded to consider the accused as "uniquely individual human beings." *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (Brennan, J., concurring). This truism notwithstanding, it must also find "similar cases" and thus reach "similar results." Murder is by its very nature and definition a gross and extraordinary aberration from the norms of civilized conduct. It would therefore seem to be among the least likely of all phenomena to admit to easy or useful classification. How often, for example, can a jurisdiction be expected to confront a homicide such as this one:

[T]he victim had been disemboweled and a butcher knife with a 12-inch blade was plunged into the unclothed upper part of her body. Her internal organs had been removed. She suffered 44 separate stab wounds in the trunk and chest....

Fulghum v. State, 246 Ga. 184, 269 S.E.2d 455 (1980). How frequently may a state find a crime such as this:

> At the time of her death, the nine months old child weighed 5½ pounds, had 2 rib fractures, parts of her lungs had begun to collapse, and she was so severely malnourished and dehydrated that her liver had been damaged, her skin had dried and wrinkled from a loss of underlying fatty tissue and her abdomen had swollen and was distended. Further she had wounds of unknown origin in various stages of healing on her head, face, neck, back, chest, genital area, legs and arms.

Lackey v. State, 246 Ga. 231, 271 S.E.2d 473 (1980). These two cases, drawn from the most recent volume of the Georgia Reporter, may suggest the truely extraordinary ranges of depravity which must be filled before any comparison of "similar cases" is possible. Moreover, the fact that neither *Lackey* nor *Fulghum* resulted in the death penalty should only reinforce this conclusion.

It is obvious then that the requirement that "similar cases" be considered creates enormous practical difficulties when the extraordinary range of human depravity encompassed under the term "homicide" is considered. But, nonetheless, this fact is probably the least significant problem in a proportionality review. Much more difficulty is apparent in the initial process of characterizing the case to be compared. As was suggested in *Moore* earlier, there is simply no "rational" basis for choosing between such views. This problem has already been detailed with respect to *Godfrey*, but other examples are readily available. Thus, one sees no "objective" way to decide whether a proportionality review in *Fulghum* should focus on the extraordinary facts quoted above, or other, perhaps equally extraordinary points which could have been cited:

APPENDIX—Continued

[A]ppellant had a religious obsession concerning the devil and had at various times attempted to pull his eyes out and kill himself . . . Family members testified concerning appellant's religious obsessions and various hospital commitments. Dr. Lloyd T. Baccus, a psychiatrist, who examined appellant under a court order, concluded that appellant was a paranoid schizophrenic, chronic type. It was his opinion that appellant had attempted to convert Ms. Pirrie and then had seen her as a personification of Satan. This had lead to appellant's act of murder. . . .

246 Ga., at 185, 269 S.E.2d 455. On such a record, this Court can see no way to characterize the crime which could not fairly be termed an "arbitrary and capricious" choice. Certainly, this Court would find little guidance in commentaries like the remark of *Godfrey* that "[a]n interpretation of § (b)(7) so as to include all murders resulting in gruesome scenes would be totally irrational." 446 U.S., at 433, n.16, 100 S.Ct., at 1767, n.16 (Stewart, Blackmun, Powell, Stevens, JJ.).

The problems inherent in proportionality review are not merely matters of definition. Even were it possible to know which, among the many facts of a particular case, were determinative, and, even were it also possible to identify a sample of "similar cases," it would still be necessary to find some pattern to follow. However, the central thesis of *Furman* is that juries had, to that time, failed to follow any pattern at all. *Furman*, of course, characterizes prior jury sentencing as "freakish" and based on mere "whim," which admitted no rational distinction. *See, e. g.*, 408 U.S., at 294, 92 S.Ct., at 2764. Thus, no constitutional pattern can possibly be expected in this pre-1972 law. Moreover, if such a pattern were ever to be devised, it would surely require some profound change in jury *behavior* under the new statute. Additionally, these changes would need years to become apparent and to be applied to a sample of situations broad enough to support meaningful appellate review. There is simply no basis whatever for believing that sentencing procedures have changed significantly in Georgia since the current statute was enacted. *See* Bowers and Pierce, Arbitrariness and Discrimination Under Post-*Furman* Capital Statutes, *Crime & Delinquency*, 563 (October, 1980); *see also* Dix, Appellate Review of the Decision To Impose Death, 68 Geo. L.J. 97 (1979). Moreover, there was certainly no significant moritorium on imposition of capital punishment after *Furman* to allow such patterns to appear. Thus, it can hardly be surprising that *Moore v. State*, decided in 1974, relied *inter alia* on several pre-*Furman* cases. *See, e. g., Callahan v. State*, 229 Ga. 737, 194 S.E.2d 431 (1972).

In sum, it appears to this Court that the procedures mandated by *Furman* do not now and in fact never will achieve the standard set out in that opinion and succeeding cases. It is apparent from even the brief review undertaken here that the Georgia statute in particular falls well short of the monumental intellectual breakthrough which has eluded draftsmen through most of Anglo-Saxon political history. Far from guiding juries to rational choices, the statute merely catalogues a laundry list of considerations which would be obvious to any jury considering an appropriate case, but provide little, if any, real basis for their determination. Moreover, even were these factors adequately developed, there is little reason to conclude that any rational pattern might be divined given the enormous variety of factual patterns in homicide cases and the impossibility of determining which supported the jury's verdict. Finally, of course, there is simply no reason for believing that any such patterns exist or could exist, at least so long as the Supreme Court continues to sanction "arbitrary and capricious" decisions not to impose the death penalty. *See, e. g., Gregg, supra.*

V

This discussion is certainly general and preliminary. But, I believe it sufficient to support several broad comments. In the first place, one can appreciate the profound difficulty facing state legislatures and judiciaries in developing and applying capital

APPENDIX—Continued

sentencing statutes. As *McGautha* demonstrates, centuries of effort in innumerable different social and political contexts have failed to devise any system which separates homicides worthy of capital punishment from those meriting a lesser penalty. In fact, if juries are to be regarded as the "conscience of the community" in these determinations, it appears that no statute can be drawn narrowly enough to divine the very unusual circumstances where death is to be considered appropriate. The modern requirement that statutes further narrow even this limited range of cases seems if anything less feasible than prior efforts.

Against this broad historical backdrop, the Georgia law cannot be seen as a legislative failure, so much as still another reflection of the impossibility of the task. Similarly, the failings of the Georgia Supreme Court as outlined here in *Moore*, as well as in *Godfrey*, would appear to be inevitable. The state judiciary can hardly be faulted for not following patterns which do not now exist and never have. Nor can the state courts be faulted for failing to properly characterize particular cases or types of cases, when such questions of definition are, in overwhelming part, subjective matters which admit no *legal* solution.

If present law mandates the impossible from state judicial systems, it places the federal tribunal in no better position. Once general due process requirements, such as those found determinative in *Blake*, are met, and the more specific procedural requirements of capital sentencing are satisfied, as they were not in *Burger*, the federal court is forced to the brink of the extraordinary proportionality analysis which was necessary in *Moore*.[5] Inevitably, such an analysis forces the federal court "continuously to question every substantive decision of the [state] criminal justice system with regard to the imposition of the death penalty." *Spinkellink*, *supra*, at 604.

If, as this Court suspects, it is becoming obvious that the states cannot meet the requirements of *Furman* no matter how careful their efforts,[6] federal tribunals will be forced into wholesale second-guessing of verdicts which were arrived at in good faith, upon competent evidence, and at no little cost in public and private resources, to say nothing of the strain placed upon conscientious jurors in their "awesome determination." Moreover, such developments would also bring enormous "friction" to the federal system as well as between the courts and the general public, "friction" which is itself grossly disproportionate to the wretched, demented lives that often hang in the balance. Obviously, if the Constitution does mandate the impossible, the public should be informed so that their laws—or the Constitution—can be adjusted accordingly. If, upon further reflection, it appears that the Constitution does not mandate all the requirements of *Furman*, this, too, must be made clear. The resources of the federal judiciary are far too limited and the stature of the judicial branch far too hard-earned and too fragile to be dissipated in futile demands that the states somehow achieve the impossible.

VI

Among the more extraordinary results of *Furman* and its progeny is to bring unity to the views of two of the Supreme Court's most ideologically distant members. Thus, in *Woodson v. North Carolina*, *supra*, Justice Rehnquist concludes in dissent that

> it is not at all apparent that appellate review of death sentences, through a process of comparing the facts of one case in which a death sentence was imposed with the facts of another in which

5. Of course, *Spinkellink* suggests that proportionality analysis can be avoided where there is no reason to believe that the state courts are not properly following a constitutionally drawn statute. However, as has been pointed out here, there is good reason to doubt that Florida, or Georgia, or any state can follow the dictates of *Furman*. *See* Dix, *supra*.

6. Considering the very significant similarity between the crimes in *Furman* and *Moore*, it would seem that, if Georgia is following its statute properly, the exercise may be largely unnecessary in any event.

APPENDIX—Continued

such a sentence was imposed, will afford any meaningful protection against whatever arbitrariness results from jury discretion. All that such review of death sentences can provide is a comparison of fact situations which must in their nature be highly particularized if not unique, and the only *relief* which it can afford is to single out the occasional death sentence which in the view of the reviewing court does not conform to the standards established by the legislation.

428 U.S., at 316, 96 S.Ct., at 2997. As for the efficacy of these standards, Justice Rehnquist echoes the logic of *McGautha* that development of meaningful standards lies "beyond present human ability." 428 U.S., at 320, 96 S.Ct., at 2998, quoting *McGautha, supra*, 402 U.S., at 204, 91 S.Ct., at 1465.

Five years later, concurring in *Godfrey*, Justice Marshall, while adhering to his view that the Constitution forbids "arbitrary" infliction of the death penalty, nonetheless concluded that "the Court in *McGautha* was substantially correct in concluding that the task of selecting in some objective way those persons who should be condemned to die is one that remains beyond the capacities of the criminal justice system." 446 U.S., at 442, 100 S.Ct., at 1772. Furthermore, Justice Marshall concludes, based on a variety of factors, that appellate courts are probably "incapable of guaranteeing the objectivity and evenhandedness that the Court contemplated and hoped for in *Gregg*." *Id.*, at 429, 100 S.Ct., at 1770.

Of course, this agreement on the current state of the law certainly does not extend to a common prescription of the solution. But, it does perhaps signal the possibility of some change. Other facts also point to the likelihood, if not the necessity, for a serious reassessment of the *Furman* approach. Two are obvious here. In *Gregg*, the Supreme Court cites *Moore v. State, supra*, for the proposition that mitigating factors ("his youth, the extent of his cooperation with the police, his emotional state at the time of the crime," 428 U.S., at 197, 96 S.Ct., at 2936 (quoted above)), are to be considered. In fact, *Moore* displayed *all* these mitigating factors and others as well. Yet, the death penalty was sustained.

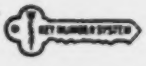
Second, in *Godfrey*, the Supreme Court avoided the conclusion that (b)(7) had never been effectively limited in Georgia by abstracting several propositions from the Georgia case law. This discussion included *inter alia* the observation "derived from *Blake* alone ... that the word 'torture,' must be construed *in pari materia* with 'aggravated battery' so as to require evidence of serious physical abuse of the victim before death." 446 U.S., at 431, 100 S.Ct., at 1766 (Stewart, J.) (footnote omitted). In fact, the trial court's report in *Blake* specifically indicates that the victim was *not* physically harmed or tortured in any way. Thus, even if the Georgia Supreme Court can be credited with the proposition derived from *Blake*, this proposition has not been followed even with respect to Mr. Blake himself. *See also* 446 U.S., at 436, 100 S.Ct., at 1768 (Marshall, J., concurring).

I will not attempt to specify here by notion of the ultimate or proper outcome of a reevaluation of *Furman*. However, several points are clear from *Blake, Burger*, and *Moore*. First, it does not seem possible to completely eliminate proportionality review. *Moore* demonstrates that some judicial role is essential, if only so that the judiciary may correct its own mistakes. Extreme cases like *Moore* do indeed "shock the conscience." Moreover, because specific factual findings can be available, this review need not be perfunctory or ungrounded. Similarly, this Court believes that an occasional jury determination may be the proper subject for appellate reversal where no rational basis for the sentence of death can be divined. Thus, the major contribution of *Furman* may in retrospect be the conclusion that evolving standards of society now limit capital punishment to "a small number of extreme cases." *Gregg, supra*, 428 U.S., at 182, 96 S.Ct., at 2929 (Stewart, Powell, and Stevens, JJ.). A defendant may be due the benefit of this development, and reviewing courts may perhaps properly decline to sanction a death sentence where no rational trier of fact could place the crime or the

APPENDIX—Continued

criminal at this extreme. *Jackson v. Virginia*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979). *See also Godfrey, supra*, 446 U.S., at 451, 100 S.Ct., at 1776 (White, J., dissenting).

To be sure, this standard is vague. But, nonetheless, it is a judicial standard and a judicial approach. At the least, it spares other reviewing courts the extraordinary role of connoisseur of blood and dementia which necessarily accompanies the comparative analysis approved in *Gregg* and conducted here in *Moore*. Of course, visions of comparing "similar cases" and discovering "patterns" of sentencing have the seductive appeal of science and mathematics. But, as Justice Harlan observed, this appeal is illusory. There is no objective way to describe "the case" at hand. There are no "similar cases," and there is no constitutional sentencing "pattern." On the other hand, applied with due care and circumspection, a *limited* judicial standard offers the opportunity for meeting the occasional, exceptional situation where imposition of the death penalty might amount to an error of constitutional dimensions. This limited role is not merely all that an appellate or habeas court should play; it is the only role these courts can play. "Such is the human condition." *Spinkellink, supra*, at 605.



The STROH BREWERY COMPANY, an Arizona Corporation, Plaintiff and Counter-Defendant,

v.

GRAND TRUNK WESTERN RAILROAD CO., a Michigan Corporation, Defendant and Counter-Plaintiff.

Civ. A. No. 78-72172.

United States District Court, E. D. Michigan, S. D.

April 29, 1981.

Action was brought against railroad under Carmack Amendments by brewery to which hopper car full of grain had been misdelivered. The District Court, Julian Abele Cook, Jr., J., held that: (1) railroad was not strictly liable for special or consequential damages which were incurred due to breach of contract of carriage, where the damage occurred after delivery and while goods were presumptively in exclusive possession and control of plaintiff; and (2) plaintiff's mere act of paying to consignee the value of grain in car which was misdelivered did not constitute an election of remedies such as would preclude plaintiff from maintaining the action against the railroad on consignee's claim which had been assignor to plaintiff.

Order accordingly.

1. Carriers ⇐94(4)

Damage caused by barley in misdelivered hopper car being placed into brewing process was reasonably foreseeable by railroad which had vast experience in hauling and delivery of grain and which, through its employees, knew importance of order in which cars were to be delivered and that brewery received malt and corn grits and not barley; thus railroad was liable to brewery. Interstate Commerce Act, § 20(11), 49 U.S.C. (1976 Ed.) § 20(11).

2. Carriers ⇐91, 94(3), 108, 132

Common carrier is generally liable to consignee without proof of negligence if consignee can establish that the goods, which were delivered to common carrier, were either not received or were received in damaged condition, unless carrier can show that damage was caused by shipper, acts of God, public enemy, public authority, or inherent vice or nature of commodity or that consignee was negligent and, if carrier satisfies exception, burden of proving negligence reverts to consignee which must then prove that carrier was actually negligent. Interstate Commerce Act, § 20(11), 49 U.S.C. (1976 Ed.), § 20(11).

3. Carriers ⇐94(4)

Railroad was not strictly liable for special or consequential damage incurred due

APPENDIX D

IN THE SUPERIOR COURT OF TATTNALL COUNTY

STATE OF GEORGIA

WILLIAM NEAL MOORE, Petitioner	*	
VS	*	CIVIL ACTION NO. 78-22
JOE S. HOPPER, Warden, Georgia State Prison, Respondent	*	

ORDER

The above captioned case having come before this Court for a hearing on March 30, 1978, and after hearing oral testimony and considering documentary evidence admitted in the case, this Court makes the following findings of facts and conclusions of law.

FINDING OF FACTS AND CONCLUSIONS OF LAW

This Court is compelled to find that the Petitioner is incarcerated in the Reidsville Penitentiary on Death Row after having entered pleas of guilty to the offenses of murder and armed robbery in the Superior Court of Jefferson County, Georgia, and was sentenced to death by the Honorable Walter C. McMillan, Jr., on the 17th day of July, 1974.

This Court is compelled to find that Petitioner's plea and sentencing was appealed to the Supreme Court of Georgia, but was unsuccessful. Moore v. State, 233 Ga. 861 (1975). A petition for Certiorari to the U. S. Supreme Court was filed but later denied. Moore v. Georgia, 428 U. S. 910 (1976). Re-hearing denied, 429 U. S. 873 (1976).

This Court finds that another appeal was filed with the Georgia Supreme Court following the setting of a new execution date which was also unsuccessful, Moore v. State, 239 Ga. 67 (1977). Cert. denied 98 Supreme Court, 232.

The Petitioner contends that his constitutional rights are being violated and raises the following issues:

App. 13

Filed in Office
This 26th day of July 1978
Deputy Clerk

I. Ineffective assistance of counsel.

1. Alleged failure of counsel to advise the Petitioner of his right to withdraw his plea.

2. The Petitioner did not waive his right to withdraw his plea.

II. Involuntary guilty plea.

Petitioner's plea of guilty should not have been accepted on July 17, 1974, because the Petitioner denied any intent to kill the robbery victim.

III. Insufficient record for appellate review due to the lack of the argument of the District Attorney being taken down and transcribed.

IV. Alleged adverse pretrial publicity which may have caused the Judge and the District Attorney to be less than impartial.

V. Sentencing contentions.

1. Sentence is disproportionate due to the presence of substantial mitigating circumstances.

2. Allegation that the State can show no comparable case in which the death penalty was imposed.

3. The Petitioner's prior arrest record and convictions contained in a pre-sentence report was presented to the Judge before the Petitioner or his counsel had a fair opportunity to review that report in order to explain or rebut its contents.

This Court finds that the offenses which resulted in the Petitioner's being sentenced to death by electrocution occurred on April 2, 1974. This Court finds that approximately ten (10) days after Petitioner's arrest, attorney Hinton R. Pierce was retained by the Petitioner's family.

App. 14

When Mr. Pierce began his investigation into the case, he found out the Petitioner had fully confessed to the murder and armed robbery of Fredger Stapleton; the Petitioner had shown the law enforcement officers where the proceeds of the robbery were hidden; the Petitioner had explained to the law enforcement officials what he had done with the wallets containing the robbery proceeds; the Petitioner had led the law enforcement officials to the location of the murder weapon and of the shotgun of the victim which he had taken after the robbery.

This Court finds that Petitioner's attorney, after discussing the situation with the Petitioner and certain members of his family, suggested that it would be in Petitioner's best interest if he entered a plea of guilty. This Court finds that the attorney's recommendation to plead guilty was somewhat prompted by a recent murder of an elderly couple in that area which had generated a good deal of media publicity. This Court finds that the Petitioner's attorney did not feel that he could be successful if he filed a motion for a change in venue.

This Court finds that while the State had informed Petitioner's attorney, Mr. Pierce, it would seek the death penalty against the Petitioner if it successfully obtained a conviction, Mr. Pierce, Petitioner's attorney, pointed out that the constitutionality of the Georgia death penalty had not been tested by the United States Supreme Court. This is reflected in the direct appeal. Moore v. State, supra, at p. 862.

This Court finds that Mr. Pierce believed that he would get more leniency regarding the sentence from a judge if the Petitioner would enter a plea, since in his opinion it would be harder for a judge sitting alone to impose the death penalty versus a jury of twelve (12) who could spread the decision to impose such a sentence among themselves.

Petitioner's attorney, Mr. Pierce, testified before this Court that he had discussed the matter of pleading guilty in detail with the Petitioner on several occasions prior to arraignment.

Petitioner's attorney, Mr. Pierce, testified that he talked with the investigating officers, and reviewed the Petitioner's confession, which in

App. 15

his opinion, was iron-clad, which left him with virtually no viable defenses whatsoever on behalf of the Petitioner.

Petitioner's attorney, Mr. Pierce, testified before this Court that, based upon his investigations, it was his opinion, that there were no witnesses or other evidence which could have changed the outcome of the case had it been tried before a jury.

This Court finds that Petitioner's attorney, Mr. Pierce, explained to the Petitioner in detail the law in relation to the facts, the elements of the offenses for which Petitioner was charged, as well as what the State was required to show in order for the death sentence to be imposed.

This Court is compelled to find that Petitioner's attorney, Mr. Pierce, fully advised Petitioner of the constitutional ramifications which accompanied a plea of guilty, which included informing the Petitioner of his rights to withdraw his plea prior to the sentence being filed by this Court. Petitioner's attorney, Mr. Pierce, testified before this Court that he specifically recalled that he was aware of the Petitioner's right to withdraw his guilty plea because during the noon recess at the July 17, 1974, hearing the Judge, the Honorable Walter C. McMillan, Jr., stopped him to inquire of him as to whether he had informed the Petitioner of his right to withdraw his plea.

Petitioner's attorney, Mr. Pierce, in his testimony before this Court, pointed out that the ultimate decision as to what plea was to be entered was made by the Petitioner, William Neal Moore. However, Petitioner's attorney, Mr. Pierce, did tell the Petitioner that, in his opinion, to plead guilty was in his best interest since, in view of the confession, he did not feel that the Petitioner had any chance with a jury, particularly in regard to sentencing.

Petitioner's attorney, Mr. Pierce, testified before this Court that after the Petitioner received the death penalty that he, in the long run, did not feel that Petitioner had anything to gain by withdrawing the plea, since if the plea were withdrawn, a jury in his opinion would return the same sentence.

This Court finds from the testimony of both the Petitioner and that of his attorney, Mr. Pierce, that the Petitioner by pleading guilty sought to invoke the mercy of the Court; that is, to ask leniency by hoping that a plea of

guilty would result in the Court granting him a sentence of less than death by electrocution.

Petitioner's attorney, Mr. Pierce, testified that he believed that a plea of guilty on the record is a strong mitigating factor, particularly when presenting a client's case either before an appellate court or before a Board of Pardons and Parole. Petitioner's attorney, Mr. Pierce, testified that he believes that a Parole Board would take a much closer look at a death sentence imposed as a result of a guilty plea than they would had a jury imposed it. Petitioner's attorney, Mr. Pierce, believed that because there was a lot of mitigating circumstances, even though the sentence of death was imposed by the Judge, that an appellate court or a review panel such as the Board of Pardons and Parole would be more sympathetic toward setting aside the death penalty either on the basis that the sentence was disproportionate, or because of the presence of mitigating circumstances. Thus, Mr. Pierce, in his testimony, reflected the fact that if he withdrew his client's plea, a jury would in his opinion return the same sentence. Mr. Pierce testified before this Court that he and the Petitioner had in fact discussed a contingency plan in the event that the death penalty was imposed, and the plan was to abide and allow the Judge's sentence to stand, regardless, particularly for purposes of appellate review.

After considering the evidence in this case this Court concludes that Petitioner received effective assistance of counsel from his attorney, Mr. Pierce, and that counsel adequately investigated the charges; discussed the charges and the results of the investigation with both the Petitioner and his family, offered his best advice, but did not insist upon a guilty plea; advised the Petitioner of all of his various rights involved in a plea of guilty; discussed with the Petitioner the elements of the crimes in relation to the facts so as to insure the voluntariness of the plea; that the decision not to withdraw the plea even in fact of the sentence of death was an agreed upon course of action which the Petitioner and his attorney had settled on, believing that through the appellate route, as well as through the review by the Board of Pardons and Paroles the sentence would be reduced; the Petitioner's attorney

App. 17

did all that an attorney should have done to insure the voluntariness of his client's plea as well as after the plea by presenting a good deal of evidence in mitigation, both oral and written; and, that the Petitioner's attorney did provide advice as to his client's right to withdraw his plea.

In amendment to the Petitioner's petition, it is alleged that after the trial judge had prepared a written sentence and filed it before oral pronouncement, that the Defendant was in effect sentenced in absentia and denied a right to withdraw his plea. The fact that a trial judge is meticulous enough to prepare written findings of fact and conclusions as a part of his sentence before reading it in open court, and the fact that he hands it to the clerk for filing prior to reading it in open court, does not amount to a sentence in absentia, particularly when the Petitioner has counsel present in the courtroom at the time the sentence is read, and further where there is an agreement between the Petitioner and his counsel to abide by the judge's decision of sentencing regardless of what sentence is imposed for review purposes.

This Court concludes that Petitioner's plea was freely, voluntaily, and intelligently entered.

This Court finds that after reviewing the plea trnascript of June 4, 1974, that the trial judge personally advised Petitioner as to the possible sentences he could receive based on his guilty plea and that Petitioner acknowledged that he knew he was charged with offenses of armed robbery and murder. The Court further finds from reviewing said transcript that the Petitioner acknowledged that he was pleading guilty to the offenses of murder and armed robbery and that he was authorizing his attorney to enter such pleas to the charges in his behalf; that he was in fact guilty as charged in the indictment; that he was able to hear and understand the Court's statements and questions; that he was not under the influence of alcohol, drugs, narcotics or other pills; that no one had made any threats, or coerced him or for that fact made any promises to him in return for his pleas of guilty; and that questions covering these matters had previously been read and explained to him. This Court further finds that Petitioner, in response to the Court's

App. 19

inquiry on June 4, 1974, stated that he understood that he had a right to be tried by a jury and that by pleading guilty he was waiving that right. The Petitioner further advised the Court that he had no witnesses to call on his behalf. This Court finds that the trial court, after accepting Petitioner's guilty pleas, delayed sentencing until July, 1974, and at the sentence hearing on July 17, 1974, this Court finds that the sentencing court again inquired of the Petitioner as to whether or not he wanted to plead guilty and whether he wanted the Judge to make the sentencing determination and, that he had a right to withdraw his pleas if he so desired.

Petitioner contends that his plea was involuntary and should not have been accepted by the trial judge because he later told the judge at the conclusion of the presentation of evidence in the sentencing phase of the proceeding on July 17, 1974, that he did not intend to kill the victim, and because of this the Court should not have accepted his plea since this amounts to the failure of the Petitioner to admit his guilt as to an essential element of the offense of murder.

This Court concludes that said contention is without merit. Petitioner entered his pleas of guilty on June 4, 1974, and reiterated his desire to have that plea stand on July 17, 1974, and further concludes that he was in fact guilty of each offense as charged in the indictment, to and including his admitting the essential elements of each of those offenses.

This Court finds from the testimony before this Court that Petitioner's attorney, prior to Petitioner's plea, advised him of the elements of the crimes with which he was charged as well as what constitutes malice, both expressed and implied, as it pertained to the murder charge.

In addition, the Petitioner by his own testimony to the sentencing court on July 17, 1974, told the Court that he and the cousin of the victim had planned to get the victim's money and burn him up in the house. By his own words, the Petitioner in this portion of his statement to the Court demonstrated express malice towards his victim. This Court finds from the Petitioner's testimony to the sentencing court on March 30, 1978, that the Petitioner admitted that at the time he entered the victim's home he carried with him a .38-caliber pistol; that it was not usual for him to carry such a weapon, as he generally left it in his car; that he carried it with him so that when he entered the victim's home he would have it in case he met any opposition; that because he met opposition he found it necessary to use the gun; and, that he intended to go into the victim's home with a loaded gun.

This Court concludes from the evidence in this case that Petitioner, in entering his pleas of guilty, admitted that he was in fact guilty of each offense as charged in the indictment, to and including his admitting the essential elements of each offense.

Petitioner in his petition contends that his constitutional rights are being violated and urges as a basis for relief his contention that the transcript of the sentencing hearing following the plea being entered is incomplete, and as such, denied the Petitioner an adequate appellate review because arguments of counsel were not transcribed. Petitioner contends that on appeal there was no reliable basis to determine "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." This Court finds that the Petitioner has failed to show how he was harmed. Neither has the Petitioner shown that any request was made to have the arguments of counsel taken down and transcribed particularly since this is not required unless directed by the Court under Ga. Code Ann., Section 27-2401.

This Court concludes that since no request was made, this matter has been waived by the Petitioner. Further, Petitioner has not shown how he was actually prejudiced on how the failure to take down and transcribe the arguments of the District Attorney has rendered the proceedings fundamentally unfair.

This Court concludes that said contention is without merit. See Stephens v. Hopper, decided July 6, 1978, ____ Ga.____.

Petitioner contends that his constitutional rights are being violated because the State at the sentence hearing on July 17, 1974, failed to furnish to either him or his attorney a copy of a pre-sentence report. This Court finds from examination of pages 27 and 28 in the July 17, 1974, transcript which is contained in Respondent's Exhibit No. 2, the following:

> "BY MR. THOMPSON:
>
> Now, if Your Honor please, we have referred on several occasions to a report that was made by the Probation Officer, Mr. Clark Rachels, which included a Crime Lab report, I would

App. 20

like to submit the entire records as State's Exhibit No. 27 that you now hold in your hand. Counsel for the Defendant has received the copy of the report so that it will include in the record, which includes reports and letters that have been submitted by Counsel for Defendant.

BY MR. PIERCE:

That is agreeable, Your Honor, and at the same time, we would like for a copy of the warrants to go in also.

NOTE: Probation Officer's Report admitted as State's Exhibit No. 27."

Respondent's Exhibit No. 6, which is an affidavit from the Officer who prepared the pre-sentence report reflects that prior to the sentencing on July 17, 1974, he furnished a copy of his report to the Petitioner's attorney, and that the Petitioner's attorney requested a short period of time prior to the hearing in order to review its contents and make any comments.

Therefore, this Court concludes that said contention is without merit.

Petitioner contends that due to certain unfavorable pre-trial publicty in the community surrounding a murder of an elderly couple which occurred prior to the murder and armed ro-bery in this case that the murder of this elderly couple was of such a nature that it caused the District Attorney and the Judge to be effected to the extent that they could not reasonably purge from their minds the local prejudices which might be associated with those killings.

This Court concludes that any such objection was waived through the failure to challenge the District Attorney and the Judge for cause, the lack of any showing of actual prejudice, and the fact that the sentence as to arbitrariness has been found on appeal to be without merit.

CONCLUSIONS OF LAW

In a habeas corpus petition the burden is upon the Petitioner to establish a factual basis for his contentions. Sims v. Smith, 228 Ga. 136 (1971). The

App. 21

judge in such a proceeding is the trier of the facts, and as such is under no obligation to believe the testimony of the Petitioner, McIntyre v. Balkcom, 229 Ga. 81(1) (1972); and may in fact reject in whole or in part the Petitioner's testimony and choose to credit the testimony of another witness.

In his testimony to this Court the Petitioner indicated that by pleading guilty he sought to obtain mercy. The Petitioner also stated that he was unfamiliar with the criminal justice system to some extent and did what most individuals unfamiliar with the criminal justice system would have done, namely seek the advice and assistance of an attorney with regard to what the evidence revealed so that he could more intelligently select which option should be exercised.

> "When one seeks the assistance of counsel, he thereby confesses his own inadequacy in the field and stipulates his willingness, like any other client,. . .to be bound by the presumably superior knowledge of the professional man on whose assistance he proposes to depent." Williams v. Beto, 354 F2d 698, 705-706 (5th Cir. 1965).

> "As we said in Brady v. United States, 397 U. S. 756, 757, 25 LEd. 2d at 760, 761, the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be indispute. In face of unavoidable certainty, the Defendant and his counsel must make their best judgment as to the weight of the State's case. Counsel must predict how the facts, as he understands them, would be viewed by a court.

App. 22

If proved would those facts convince a judge or jury of the defendant's guilt?" McMann v. Richardson, supra, at p. 770.

"It is no denigration of the right to trial to hold that when the defendant waives his State court remedies and admits his guilt he does so under the law then existing; further, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts. Although he might have pleaded differently had later decided cases been the law, he is bound by his plea and his conviction unless he can allege improved serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act." McMann v. Richardson, supra, at p. 774.

In collateral proceedings there exists the general policy of not judging counsel's action by hindsight in the area of tactical decisions which counsel employed especially when these actions follow accepted legal strategy, and when it appears that the decision or recommendation to undertake such strategy was in the best interests of the accused. Vessels v. Estelle, 376 F.Supp. 503 (S.D. Tex. 1973), aff'd 494 F.2d 1295 (5th Cir. 1974); United States v. Plummer, 171 F. Supp. 1 (D.C. Cir. 1959).

When an individual elects to enter a plea of guilty and that decision is later challenged on the basis of ineffective assistance of counsel, the review of such a contention is to be directed towards determining whether counsel fulfilled his duty to his client to insure that his decision to plead guilty was voluntarily and knowingly made. Tollett v. Henderson, 411 U.S. 258 (1973); Akridge v. Hopper, 545 F2d 457 (5th Cir. 1977); Collins v. Green, 505 F.2d 22 (5th Cir. 1974). A defendant under the Sixth Amendment has the right to counsel, which means effective assistance of counsel. That is, an attorney furnishing

App. 23

reasonably effective assistance to his client, said assistance not being errorless, and not being a judgment which is rendered by hindsight. West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973); MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1968); Mitchell v. Hopper, 239 Ga. 781 (1977) (guilty plea resulting in a sentence to death by election); Pullin v. State, 237 Ga. 759, 760(3) (1976) (death penalty case); Young v. State, 239 Ga. 53, 60 (1977) (death penalty case); Pitts v. Glass, 231 Ga. 638 (1974). Effective assistance of counsel is not determined on the basis of how another attorney would have handled a similar factual situation. Riley v. State, 237 Ga. 129 (1976); Brown v. Ricketts, 233 Ga. 809, 814 (1975). Initially, it must be presumed that at the time an individual elects to plead guilty he does so with the assistance of competent counsel. See generally; United States v. Strouder, 433 F2d 846 (8th Cir. 1970), art. den. 401 U.S. 943 (1971).

In a guilty plea situation there is a difference between counsel and his duties towards his client when a defendant enters a plea of guilty versus counsel who represents an individual at a jury trial. See Jones v. Henderson, 549 F.2d 995 (5th Cir. 1977). The standard for examining the competency of counsel in a guilty plea situation varies depending on the factual and legal difficulties of the charges with which the defendant is faced, but generally the investigative efforts are less exhaustive than those which usually accompanies a trial on the merits. Lee v. Hopper, 499 F.2d 456 (5th Cir. 1974).

> "The principal value of counsel to the accused does not lie in counsel's ability to recite a list of possible defenses in the abstract nor in his ability, if time permitted, to amass a large quantity of factual data and inform the defendant of it. Counsel's concern is the faithful representation of the interest of his client, and such presentation frequently involves highly practical considerations as well as specialized knowledge of the law.

App. 24

> Often the interest of the accused are not advanced by challenges that would delay the inevitable date of prosecution, . . .or by contesting guilt. A prospect of plea bargaining, the expected or hope of a lesser sentence, or the convincing nature of the evidence against the accused are considerations that might well suggest the advisability of a guilty plea . . . . He must be able to establish that his attorney's advice to plead guilty rendered such advice outside the range of competence demanded of attorneys in criminal cases." Tollett v. Henderson, supra, at pp. 267-268. (Emphasis added).

Sub judice, attorney Pierce gave the Petitioner the best professional advice he could give. The attorney fully investigated the facts, examined the confession and discussed the charges with both the investigating officer and the Petitioner. Likewise, the attorney explained to the Petitioner the law in relation to the facts so as to insure the voluntariness of the Petitioner's plea. See Edwards v. Estelle, 541 F.2d 1162 (5th Cir. 1976); Harris v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974). See also Gaines v. Ricketts, 554 F.2d 1346 (5th Cir. 1977). The record in this matter also establishes that counsel was not ineffective in failing to advise the Petitioner of his right to withdraw his plea, since counsel testified that to the best of his recollection he did give such advice to the Petitioner. Martin v. Hopper, 235 Ga. 93, 94 (1975). See also Marshall v. State, 128 Ga. App. 413 (2) (1973).

An examination of the plea hearings on June 4 and again on July 17, 1974, reveal that the Judge made a full inquiry into the voluntariness of the Petitioner's pleas in compliance with Boykin v. Alabama, 395 U.S. 238 (1969). In that inquiry the court also advised the Petitioner that he had a right to withdraw his plea if he so desired, which is further evidence of the fact that the Petitioner knew of his right to withdraw his plea.

App. 25

The testimony of the Petitioner's attorney, while in conflict with that of the Petitioner, regarding whether the elements of the offenses were explained to him by his attorney, calls for a credibility determination on behalf of the Petitioner's attorney. The Petitioner's own testimony concerning the events surrounding the robbery and murder also clearly shows contrary to the Petitioner's assertion that his plea is involuntary under Henderson v. Morgan, 426 U.S. 637 (1976) is not applicable, since the lawyer's testimony shows that the attorney fully explained the elements of the offenses to the Petitioner. Moreover, Henderson v. Morgan, supra, is not applicable in this instance since the plea record shows that the Petitioner knowingly, intelligently and voluntarily entered his pleas, and that the information the court had at the time the pleas were taken fully supports the court's finding that the Petitioner at the time of the shooting intended to kill the robbery victim. Consequently, the trial judge on July 17, 1974, was not required to conduct a further inquiry concerning the Petitioner's remark prior to his pronouncing sentence that he did not intend to kill the victim, when the Petitioner's earlier remark showed that he and the nephew of the victim intended to rob the victim and burn him in his house.

Georgia Code Ann., Section 6-805 and Section 27-2401 address the procedure for the preparation of a record for appeal. " . . .the court reporter shall exactly and truely record, or take stenographic notes of, the testimony and proceedings in the case, except the argument of counsel." Ga. Code Ann., Section 27-2401. (Emphasis supplied)

Nowhere in the transcript of July 17, 1974, does there appear an objection to any improper argument by the District Attorney, since had there been such an objection its recording would have been required by law. See Ga. Code Ann., Section 6-805(d). Neither has the Petitioner presented any evidence to this Court that there was any objectionable argument, but rather his assertions are speculative that improper argument could have occurred, and that because of this an incomplete review to determine whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor exists.

App. 26

In Harris v. State, 237 Ga. 718, 726-27 (1976), Cert. den. , _____U.S. _____ 97 Sup. Ct., 2642, 53 L.Ed. 2d 251 (1977), it was held:

> " . . . If counsel wants the final arguments recorded it is his duty to see that it is done inasmuch as it is not required by statute. . . . counsel cannot sit by and permit some matter they could correct by timely action and later claim error.
>
> * * *
>
> One other consideration weighs against the appellant's position. If the District Attorney in his rebuttal had made some statement the appellant's counsel considered to be prejudicial to his client's case, he has a responsibility of objecting so the objectional matter and the trial judge's ruling later on will be a matter of record."

Had there been any objectionable material in the closing argument an objection should have been made. See Welsh v. State, 237 Ga. 665, 669 (3) (1976); Dungee, et al, v. Hopper, ____ Ga. ____, (Case No. 33399, Decided April 18, 1978). Furthermore, the Petitioner has not shown how he has been actually prejudiced, or that the failure to take down the closing argument of the District Attorney rendered the proceeding fundamentally unfair. Since this proceedings involved a plea of guilty wherein the sentence is determined by the judge, it will be presumed that the Court sitting without a jury would only consider proper matters, and would disregard any matters which might be considered inflamatory or prejudical. Alton v. United States, 454 F.2d 289, 296 (7th Cir. 1971, cert. den.) 406 U.S. 917 (1972); Carter v. State, 237 Ga. 617, 618 (3) (1976).

Also without merit are the Petitioner's contentions concerning the appellate sentence review procedure. Since the Georgia Supreme Court has determined that the Petitioner's sentence is not disproportionate considering the facts in similar cases, that matter may not properly be relitigated in

App. 27

habeas corpus following a direct appeal of that same issue. Phillips v. Hopper, 237 Ga. 68 (1976); Strozier v. Hopper, 234 Ga. 597 (1975); Elrod v. Ault, 231 Ga. 750 (1974).

After reviewing all the evidence in this case, this Court concludes that none of Petitioner's constitutional rights are being violated.

Therefore, it is ordered and adjudged that Petitioner be remanded to the custody of the respondent for the carrying out of the sentence of death by electrocution pursuant to the sentence of the Superior Court of Jefferson County, Georgia, dated July 17, 1974.

It is further ordered that the stay of execution heretofore entered by this Court is hereby dissolved and that a copy of the order be served upon the Honorable Walter C. McMillan, Jr., Judge Jefferson County Superior Court, Middle Judicial Circuit of Georgia, P. O. Box 701, Sandersville, Georgia; and on the Honorable H. R. Thompson, District Attorney, Jefferson County Superior Court, Middle Judicial Circuit, P. O. Box 286, Swainsboro, Georgia.

SO ORDERED this 13th day of July, 1978.

John R. Harvey
Judge Superior Court
Atlantic Judicial Circuit

App. 29

APPENDIX E

any evidence upon which the verdict can be based, the jury is free to disbelieve whatever facts are inconsistent with their conclusion and the court cannot substitute its conclusion for that of the jury and enter a judgment notwithstanding the verdict. On such a motion the evidence must be accepted which is most favorable to the party in whose favor the verdict was rendered." (Emphasis supplied.) See also *Warren v. Anderson*, 221 Ga. 533 (145 SE2d 536) (1965); *Mississippi Tank Co. v. White*, 108 Ga. App. 609 (134 SE2d 66) (1963) ("If the evidence presents jury questions on material issues, a motion for judgment n.o.v. will not lie."); *Barnum v. Martin*, 135 Ga. App. 712 (219 SE2d 341) (1975).

The evidence in this case presents a situation which is particularly well-suited for submission to a jury. The weighing of conflicting evidence and evaluation of the credibility of witnesses are tasks which are peculiarly within the jury's province. Accordingly, the judgment of the court granting the judgment n.o.v. is reversed.

2. Appellee's contention, raised in oral argument, that the torn condition of the will made impossible any attempt to prove its contents in probate cannot be addressed by an appellate court when the appellee failed to include it as a ground in his motion for directed verdict or in his motion for judgment n.o.v.

Judgment reversed. All the Justices concur. Bowles, J., not participating.

ARGUED APRIL 11, 1977 — DECIDED APRIL 27, 1977 — REHEARING DENIED MAY 26, 1977.

Revocation of will. Fulton Superior Court. Before Judge McKenzie.

Houston White, Sr., Strother & Weiner, Beryl H. Weiner, John C. Yancey, for appellant.

Heyman & Sizemore, Gerald M. Edenfield, George H. Myshrall, Jr., for appellees.

32138. MOORE v. THE STATE.

UNDERCOFLER, Presiding Justice.

Appellant was sentenced to death on July 17, 1974, following guilty pleas to charges of murder and armed

robbery. This court affirmed. *Moore v. State*, 233 Ga. 861 (213 SE2d 829) (1975), cert. den. 428 U. S. 910 (1976).

This appeal is from the denial of a petition and motion to grant appellant a new trial on the issue of sentence by virtue of the court's general equitable powers and authority to enter declaratory judgments. Appellant argues that at the time of his death sentence the trial judge may not have imposed it except for a mistaken belief that such sentence would never be upheld by the U. S. Supreme Court. We affirm. Petitions and motions of the nature presented here are not maintainable.

"Our existing post conviction relief procedures are available to provide justice." *Ross v. State*, 238 Ga. 445 (233 SE2d 381) (1977); *Smith v. State*, 238 Ga. 555 (1977).

Ancillary to the case under review appellant has filed in this court a motion to order the trial court to hold a hearing to determine whether or not the trial judge imposed the death sentence, at least in part, on the basis of information which the appellant has no opportunity to deny or explain. See Gardner v. Florida, — U. S. — (97 SC 1197, 51 LE2d 393) (1977). As stated above our existing post conviction proceedings are available to provide justice. The motion in this court is denied without prejudice.

Judgment affirmed. All the Justices concur.

ARGUED APRIL 11, 1977 — DECIDED MAY 13, 1977 — REHEARING DENIED MAY 26, 1977.

Murder; armed robbery. Jefferson Superior Court. Before Judge Gray.

Pierce & House, Hinton R. Pierce, for appellant.

H. Reginald Thompson, District Attorney, Arthur K. Bolton, Attorney General, for appellee.

32173. JONES v. SPINDEL.
32183. SPINDEL v. JONES et al.

UNDERCOFLER, Presiding Justice.

Mrs. Edna Spindel, executrix for her husband's estate, in an attempt to collect an $82,000 judgment

APPENDIX F

Attorney General, Lois F. Oakley, for appellee.

29278. MOORE v. THE STATE.

PER CURIAM.

Following a plea of guilty, conviction, and sentence of death for murder and armed robbery this case is here by appeal and for mandatory review of the death sentence imposed. The appellant William Neal Moore was charged with committing the offenses of murder and armed robbery on April 2, 1974, was indicted by a grand jury in Jefferson County on May 13, 1974, and entered a plea of guilty to both charges and waived trial by jury on June 4, 1974.

After the appellant's plea of guilty was entered, the prosecution presented the testimony of the doctor who performed the autopsy on the victim's body, two investigative agents and the sheriff who investigated the offenses. The defense presented testimony by the appellant and members of his family. Thereafter, the trial judge found aggravating circumstances and imposed the death sentence.

The testimony and other evidence revealed that the appellant had been a member of the U. S. Army, and former military policeman, where he met George Curtis, a nephew of the victim Fredger Stapleton. Curtis told him about his uncle Fredger Stapleton having money and showed him where he lived. In the words of the defendant, "We planned this, he wanted to burn his uncle up, he would get the money and burn him up in the house, and we went over there and Curtis got scared after he went into the house, that was the first time, we was drinking, we had been drunk . . . we went over to the house, we went to the back door, and we got in between one of the bedrooms and the front room, there was a locked door, we left and went back over to Curtis' house. Curtis, he left and I went back over there . . ."

In the late evening of April 2, 1974, appellant apparently re-entered the Stapleton home through a

bedroom window. After gaining entrance he was surprised by Stapleton who proceeded to fire a shotgun at him. Appellant fired all five shots in his .38 caliber pistol at Stapleton. Stapleton subsequently died from two bullet wounds in the chest. After shooting Stapleton, appellant proceeded to remove two billfolds from the victim's pockets and took the victim's shotgun. Appellant then left through the front door of the Stapleton home and walked to his automobile which was parked by a laundromat nearby. He proceeded to his residence, burned the victim's wallets and disposed of the shotgun. The money taken from Stapleton amounted to $5,700, which appellant subsequently surrendered to officers. Evidence at the scene implicated the appellant and corroborated his statement.

Appellant denied any intention of killing Stapleton: "I didn't have no intention of killing him. When I went in there, he come out there with a shotgun and hit me in the leg, it scared me, made me shoot him, and I'm sorry for what I did, and ask for mercy of the court." *Held:*

1. Appellant's first enumeration of error is that "The imposition and carrying out of the death penalty in accordance with the present Georgia death penalty statute is unconstitutional and in violation of the Eighth and Fourteenth Amendments of the United States Constitution."

(a) In support of this contention, appellant argues that the discretion permitted by the death penalty statute leaves room for arbitrariness, thus rendering the statute unconstitutional as a violation of equal protection.

Although the appellant plead guilty, the record is clear that he reserved his constitutional objections at the trial level. In *Coley v. State*, 231 Ga. 829 (204 SE2d 612), this court addressed the issue of discretion in the Georgia death penalty statute (Code Ann. §§ 26-2001 and 27-2534.1 et seq.) in the face of the Eighth and Fourteenth Amendments to the Constitution of the United States as those amendments were construed and applied by the Supreme Court of the United States in Furman v. Georgia and Jackson v. Georgia, 408 U. S. 238 (92 SC 2726, 33 LE2d 346). We there noted that "it is not discretion per se which must be condemned, but it is unguided discretion

that does not 'produce evenhanded justice.'" P. 834. We found there that "the system of dispensation of the death penalty provided by the statute does not offend the principles of decision of the U. S. Supreme Court in Furman and Jackson." P. 835. Although we now find appellant's contention to be without merit, the constitutionality of the application of the death penalty to him in the instant case must be determined upon review of the sentence by this court pursuant to the current Georgia statute. Code Ann. § 27-2503 (b), as amended by Ga. L. 1974, pp. 352, 357, was not in effect and thus is inapplicable to this case.

(b) The appellant further argues that the death penalty constitutes cruel and inhuman punishment in violation of the prohibition of the Eighth Amendment to the U. S. Constitution.

We have found no case where a majority of the Supreme Court of the United States or of this court has held that the death penalty constitutes cruel and unusual punishment.

In the Furman and Jackson cases, Chief Justice Burger, dissenting, noted "that only two members of the court, Justice Brennan and Justice Marshall, have concluded that the Eighth Amendment prohibits capital punishment for all crimes and under all circumstances." See also *Coley v. State*, 231 Ga. 829, supra; *House v. State*, 232 Ga. 140 (205 SE2d 217); and *Eberheart v. State*, 232 Ga. 247 (206 SE2d 12).

2. (a) The appellant contends as to the sentence that the imposition of the death penalty in this case is disproportionate to the sentence imposed in other similar cases.

Appellant cites two trials, not a part of the record of this trial, which he alleges are similar to the facts in the instant case wherein the death sentence was not imposed. Although they were not considered by the trial judge and cannot be considered by this court, some comment is appropriate concerning this court's duty to compare the sentence in this case with that imposed in similar cases. As we view the court's duty in light of the Furman and Jackson cases and the statutory provisions designed by the Georgia legislature to meet the objections of those

cases, this court is not required to determine that less than a death sentence was never imposed in a case with some similar characteristics. On the contrary, we view it to be our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally and not "wantonly and freakishly imposed," as stated by Justice Stewart in his concurring opinion in the Furman and Jackson cases (408 U. S. 238, 310), supra. We are endeavoring to do our duty under the standards provided.

(b) It is next asserted that there was no aggravating circumstance in this case because a person cannot be guilty of armed robbery if the victim is not conscious or alive at the time of the robbery.

Code Ann. § 26-1902 provided: "A person commits armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon." Ga. L. 1968, pp. 1249, 1298; 1969, p. 810. In *Hicks v. State*, 232 Ga. 393 (207 SE2d 30), we concluded that this section "clearly contemplates that the offensive weapon be used as a concomitant to a taking which involves the use of actual force or intimidation (constructive force) against another person." P. 403.

This accords with the general rule in the United States that the force or intimidation essential to robbery must either precede or be contemporaneous with, and not subsequent to, the taking. 77 CJS 457, Robbery, § 11 (1952). In *Hicks* the taking occurred before the victim woke up.

Without the force used by appellant here, the taking from Stapleton could not have been accomplished. That Stapleton died from the force used either immediately, or subsequently to the taking, does not make the offense any less a robbery.

Appellant's admitted purpose in going to Stapleton's home was to rob him. He then shot Stapleton to overcome his resistance before taking Stapleton's money. We conclude that the evidence established that the offense of murder was committed while the appellant was engaged in another capital felony, to wit: armed robbery.

The trial judge found as mitigating circumstances that the appellant did everything that a man could do after he was caught, and did an honorable thing in making true statements, cooperating with the officials and pleading guilty. In addition to these circumstances appellant urges consideration of the following: that he fully cooperated with the police; that he is 23 years old; that he is not an experienced criminal; and that he started shooting from a combination of fright and intoxication.

In our sentence review we have considered each of the above circumstances, along with the aggravating circumstance found by the trial court and the evidence concerning the crime introduced in court.

The death sentence was imposed in this case by the trial judge without the intervention of a jury. We have reviewed the sentence as required by Ga. L. 1973, p. 159, et seq. (Code Ann. § 27-2537 (c)), as we did in *Coley v. State*, 231 Ga. 829 supra, and each subsequent case involving a death penalty under the new statute. We conclude that the sentence of death imposed here was not imposed under the influence of passion, prejudice, or any other arbitrary factor. The evidence supports the trial judge's finding of a statutory aggravating circumstance, i.e., that the offense of murder was committed while the appellant was engaged in another capital felony, to wit: armed robbery.

We have compared the evidence and sentence in this case with other similar cases and conclude the sentence of death is not excessive or disproportionate to the penalty imposed in those cases. Those similar cases we considered in reviewing the case are: *Lingo v. State*, 226 Ga. 496 (175 SE2d 657), *Johnson v. State*, 226 Ga. 511 (175 SE2d 840), *Pass v. State*, 227 Ga. 730 (182 SE2d 779), *Watson v. State*, 229 Ga. 787 (194 SE2d 407), *Scott v. State*, 230 Ga. 413 (197 SE2d 338), *Kramer v. State*, 230 Ga. 855 (199 SE2d 805), and *Gregg v. State*, 233 Ga. 117 (210 SE2d 659).

In each of the comparison cases cited, the records show that the accused was found guilty of murder of the victim of a robbery or burglary committed in the course of such robbery or burglary. In each of those cases, the jury imposed the sentence of death. In *Pass v. State*, supra, the murder took place in the victim's home, as occurred in the

case under consideration.

We find that the sentence of death in this case is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Code Ann. § 27-2537 (c) (3). Notwithstanding the fact that there have been cases in which robbery victims were murdered and the juries imposed life sentences (see Appendix), the cited cases show that juries faced with similar factual situations have imposed death sentences. Compare *Coley v. State*, 231 Ga. 829, 835, supra. Thus, the sentence here was not "wantonly and freakishly imposed" (see above.)

We have also reviewed the transcript and record in this case and have determined that the conviction and sentence are not contrary to law, and that there is ample evidence, in addition to the plea of guilty, to support the trial court's judgment. The judgment of the trial court will, therefore, be affirmed.

Judgment affirmed. All the Justices concur, except Hill, J., who concurs specially, and Gunter, J., who dissents.

ARGUED OCTOBER 16, 1974 — DECIDED FEBRUARY 12, 1975 — REHEARING DENIED March 4, 1975.

Murder. Jefferson Superior Court. Before Judge McMillan.

Hinton R. Pierce, for appellant.

H. Reginald Thompson, District Attorney, Arthur K. Bolton, Attorney General, John W. Dunsmore, Jr., Deputy Assistant Attorney General, for appellee.

HILL, Justice, concurring specially.

In Furman v. Georgia, 408 U. S. 238, supra, there were 10 opinions, one per curiam (representing the composite view of a majority of the court as to the proper result), and one by each of the Justices. Justices Douglas, Brennan, Stewart, White and Marshall found against the imposition of the death penalty in Furman. The Chief Justice and Justices Blackmun, Powell and Rehnquist dissented.

The Chief Justice noted that Justice Brennan and Justice Marshall had concluded that the Eighth

Amendment prohibits capital punishment under all circumstances as being cruel and unusual punishment, that Justice Douglas had determined that the death penalty can traverse the Eighth Amendment but did not necessarily require its final abolition, and Justice Stewart and Justice White had concluded that the death sentences before the court must be set aside because prevailing sentencing practices did not comply with the Eighth Amendment. 408 U. S. 375.

Presumably the validity of Georgia's revived death penalty statute, Ga. L. 1973, p. 159 (Code Ann. § 27-2534.1), would be found valid by the Chief Justice and the other three dissenting Justices. Presumably Justices Brennan and Marshall would find it invalid. Therefore, in order to judge the validity of the death sentence in this case it becomes necessary in my view to undertake to ascertain the positions of Justice Douglas, Justice Stewart and Justice White upon this issue.

This court found the 1973 Act to be valid in *Coley v. State*, 231 Ga. 829, supra, holding, as I read that opinion, that the Act permits the imposition of the death penalty controlled by clear and objective standards so as to produce non-discriminatory application. 231 Ga. 834. Justice Gunter, in his concurring and dissenting opinion, pointed out that the Act authorized the judge or jury to decline to impose the death penalty notwithstanding the presence of statutory aggravating circumstances. 231 Ga. 840-841.

It therefore has become necessary to undertake to ascertain how the three specified Justices, and the writer, see this issue: Where a death sentence may be withheld by uncontrolled discretion, is the imposition of the death sentence controlled by clear and objective standards nevertheless invalid?

It is difficult to divine how the three would answer, but as Justice White wrote, even though my conclusions cannot be proved, I must arrive at judgment. 408 U. S. 313. As I read Justice Douglas' concurring opinion, he would hold invalid the sentence of death where the alternative of imprisonment was left to the uncontrolled discretion of judges or juries. Justice Stewart would, I believe, hold the death sentence invalid under a statute

where the legislature has not found the penalty to be invariably necessary and where others convicted of murders and rapes just as reprehensible do not receive the unique penalty. Finally, Justice White would, I believe, hold invalid the sentence of death where juries, in their discretion, may and frequently do refuse to impose it no matter what the circumstances of the crime.

Not one of the three Justices can I feel with certainty would approve a death statute which prevents uncontrolled imposition of the penalty but which permits discretionary non-imposition.

Moreover, the defect, as they might see it, of discretionary non-imposition, may be compounded by the following:

The prosecutor has discretion in bargaining for a plea of guilty in exchange for a non-death sentence. Once on trial he exercises discretion in deciding whether to ask the jury to impose the death penalty. The trial judge has discretion to grant a new trial, accept a guilty plea, and impose a non-death sentence upon that plea. Presumably these events would occur when the evidence showing aggravation is slight.

The new sentencing procedures law, Ga. L. 1974, pp. 352, 357, will permit juries to determine whether any mitigating or statutory aggravating circumstances exist "and whether to recommend mercy for the defendant."

Although a majority of the United States Supreme Court might find the discretionary non-imposition of the death penalty to invalidate the controlled imposition thereof, I do not. In these murky waters, I do not feel that this conclusion constitutes wilful disobedience to the Constitution.

The discretionary non-imposition of a sentence of death is an act of mercy. I cannot find that discretionary mercy is unconstitutional or that it renders invalid the controlled nongranting of it. If the Constitution says otherwise, then the executives' powers of commutation provided by civilized governments would render any sentence of death invalid. Moreover, if discretionary non-imposition of the death penalty were abolished, then the inability to be merciful in an appropriate case would, in my view, constitute cruel and unusual punishment in

that case.

I concur in upholding the validity of Ga. L. 1973, p. 159 et seq. (Code Ann. § 27-2534.1 et seq).

APPENDIX.

Similar Cases Considered by the Court: *Lingo v. State*, 226 Ga. 496 (175 SE2d 657); *Johnson v. State*, 226 Ga. 511 (175 SE2d 840); *Pass v. State*, 227 Ga. 730 (182 SE2d 779); *Watson v. State*, 229 Ga. 787 (194 SE2d 407); *Callahan v. State*, 229 Ga. 737 (194 SE2d 431); *Scott v. State*, 230 Ga. 413 (197 SE2d 338); *Kramer v. State*, 230 Ga. 855 (199 SE2d 805); *Creamer v. State*, 232 Ga. 137 (205 SE2d 240); *Gregg v. State*, 233 Ga. 117 (210 SE2d 659); *Morris v. State*, 228 Ga. 39 (184 SE2d 82); *Stevens v. State*, 228 Ga. 621 (187 SE2d 281); *Kitchens v. State*, 228 Ga. 624 (187 SE2d 268); *Atkins v. State*, 288 Ga. 578 (187 SE2d 132) *Dutton v. State*, 228 Ga. 850 (188 SE2d 794); *Sims v. State*, 229 Ga. 33 (189 SE2d 68); *Scott v. State*, 230 Ga. 47 (195 SE2d 414); *Harwell v. State*, 230 Ga. 480 (197 SE2d 708); *Allen v. State*, 231 Ga. 17 (200 SE2d 106); *Conroy v. State*, 231 Ga. 472 (202 SE2d 398); *Johnson v. State*, 231 Ga. 138 (200 SE2d 734); *Pierce v. State*, 231 Ga. 731 (204 SE2d 159); *Sheats v. State*, 231 Ga. 362 (201 SE2d 420); *Emmett v. State*, 232 Ga. 110 (205 SE2d 231).

29381. OWENS v. THE STATE.

HILL, Justice.

This case is before this court on appeal and mandatory review of the death sentence. The appellant was indicted for murder occurring on January 21, 1974. Following a sanity trial at which the jury found against the plea of insanity, trial was held on May 27, 1974. The death sentence was imposed upon the verdicts.

The evidence showed that about 9:45 on the morning of January 21, 1974, Mrs. Pearl Fryer was standing at the "check-out" in Matt's Variety Store, in Manchester, Meriwether County, Georgia. Sammie Lewis Owens, the appellant, came into the store and stabbed Mrs. Fryer several times with a knife, causing her death. The appellant was not acquainted with Mrs. Fryer. After the

6th Cir. Certiorari denied. Reported below: 520 F. 2d 1220.

No. 75–524. HYSTER CO. *v.* EMPLOYEES ASSOCIATION OF KEWANEE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 519 F. 2d 89.

No. 75–1402. UNITED STATES *v.* KARATHANOS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 531 F. 2d 26.

No. 75–1562. UNITED STATES STEEL CORP. *v.* UNITED MINE WORKERS OF AMERICA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 1236.

No. 75–5873. PRESCIMONE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 530 F. 2d 971.

In the following cases (No. 74–5196 through No. 75–6653), certiorari was denied:

No. 74–5196. HOUSE *v.* GEORGIA. Sup. Ct. Ga. Reported below: 232 Ga. 140, 205 S. E. 2d 217;

No. 74–6207. ROSS *v.* GEORGIA. Sup. Ct. Ga. Reported below: 233 Ga. 361, 211 S. E. 2d 356;

No. 74–6547. MOORE *v.* GEORGIA. Sup. Ct. Ga. Reported below: 233 Ga. 861, 213 S. E. 2d 829;

No. 74–6557. MCCORQUODALE *v.* GEORGIA. Sup. Ct. Ga. Reported below: 233 Ga. 369; 211 S. E. 2d 577;

No. 74–6736. JARRELL *v.* GEORGIA. Sup. Ct. Ga. Reported below: 234 Ga. 410, 216 S. E. 2d 258;

No. 75–5022. MITCHELL *v.* GEORGIA. Sup. Ct. Ga. Reported below: 234 Ga. 160, 214 S. E. 2d 900;

No. 75–6250. SMITH, AKA MACHETTI *v.* GEORGIA. Sup. Ct. Ga. Reported below: 236 Ga. 12, 222 S. E. 2d 308;

No. 75–6536. MASON *v.* GEORGIA. Sup. Ct. Ga. Reported below: 236 Ga. 46, 222 S. E. 2d 339; and

Rehearing Denied

No. 74-1488. KLEPPE, SECRETARY OF THE INTERIOR *v.* NEW MEXICO ET AL., 426 U. S. 529;

No. 74-1542. UNION ELECTRIC CO. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL., 427 U. S. 246;

No. 74-5196. HOUSE *v.* GEORGIA, 428 U. S. 910;

No. 74-6168. HALLMAN *v.* FLORIDA, 428 U. S. 911;

No. 74-6207. ROSS *v.* GEORGIA, 428 U. S. 910;

No. 74-6377. SULLIVAN *v.* FLORIDA, 428 U. S. 911;

No. 74-6547. MOORE *v.* GEORGIA, 428 U. S. 910;

No. 74-6557. MCCORQUODALE *v.* GEORGIA, 428 U. S. 910;

No. 74-6563. SAWYER *v.* FLORIDA, 428 U. S. 911;

No. 74-6717. ALFORD *v.* FLORIDA, 428 U. S. 912;

No. 74-6736. JARRELL *v.* GEORGIA, 428 U. S. 910;

No. 75-252. MEACHUM, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* FANO ET AL., 427 U. S. 215;

No. 75-292. SERBIAN EASTERN ORTHODOX DIOCESE FOR THE UNITED STATES AND CANADA ET AL. *v.* MILIVOJEVICH ET AL., 426 U. S. 696;

No. 75-312. YOUNG, MAYOR OF DETROIT, ET AL. *v.* AMERICAN MINI THEATRES, INC., ET AL., 427 U. S. 50;

No. 75-928. ESTELLE, CORRECTIONS DIRECTOR, ET AL. *v.* JUSTICE, U. S. DISTRICT JUDGE, ET AL., 426 U. S. 925;

No. 75-974. WEST PENN POWER CO. *v.* TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, 426 U. S. 947;

No. 75-1162. WINTERS BATTERY MANUFACTURING CO. *v.* USERY, SECRETARY OF LABOR, 425 U. S. 991;

No. 75-1219. SEXTON *v.* SIMON, SECRETARY OF THE TREASURY, ET AL., 425 U. S. 973;

No. 75-1233. REA EXPRESS, INC. *v.* CIVIL AERONAUTICS BOARD ET AL., 426 U. S. 906;

No. 75-1363. ALESSIO *v.* UNITED STATES, 426 U. S. 948;

No. 75-1429. YEE *v.* YEE ET AL., 426 U. S. 911; and

No. 75-1466. BOSTON HOME & SCHOOL ASSN. *v.* MORGAN ET AL., 426 U. S. 935. Petitions for rehearing denied.

APPENDIX G

17-10-35. Review of death sentences by Supreme Court generally; forwarding of record and transcript by clerk of trial court; scope of review; right of defendant and state to submit written briefs and present oral argument; similar cases to be included in decision; direct appeal to be consolidated with sentence review.

(a) Whenever the death penalty is imposed, upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court.

(b) The Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection (b) of Code Section 17-10-30; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the state shall have the right to submit briefs within the time provided by the court and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court in its decision and the extracts prepared as provided for in subsection (a) of Code Section 17-10-37 shall be provided to the resentencing judge for his consideration.

(f) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence. (Code 1933, § 27-2537, enacted by Ga. L. 1973, p. 159, § 4.)

17-10-37. Appointment of assistant to Supreme Court to provide information from prior capital cases; employment of staff to compile data; attachment for administrative purposes of office of assistant to office of clerk of Supreme Court.

(a) There shall be an assistant to the Supreme Court who shall be an attorney appointed by the Chief Justice and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The assistant shall provide the court with whatever extracted information it desires with respect thereto, including, but not limited to, a synopsis or brief of the facts in the record concerning the crime and the defendant.

(b) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence reviewed in accordance with Code Section 17-10-35.

(c) The office of the assistant shall be attached for administrative purposes to the office of the clerk of the Supreme Court of Georgia. (Code 1933, § 27-2537, enacted by Ga. L. 1973, p. 159, § 4.)

RECEIVED
JAN 16 1984
OFFICE OF THE CLERK
SUPREME COURT, U. S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. ___

WILLIAM NEAL MOORE,
Petitioner
v.
CHARLES BALKCOM,
Warden
ARTHUR R. BOLTON,
Attorney

83-6084

MOTION FOR LEAVE TO PROCEED IN

FORMA PAUPERIS

The petitioner, William Neal Moore, who is now held in the Georgia Diagnostic and Correctional Center in Jackson, Georgia, asks leave to file a Petition of Certiorari to the United States Court of Appeals for the Eleventh Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioner has been incarcerated since April of 1974 and is impoverished. Leave to proceed in forma pauperis has previously been applied for and granted by the United States District Court for the Southern District of Georgia.

Pursuant to the provisions of the Criminal Justice Act of 1964, 18 U.S.C. Section 3006(a) on October 14, 1981 the United States Court of Appeals for the Eleventh Circuit appointed Daniel Givelber and Donald Berman to represent petitioner in this matter.

Daniel Givelber
Counsel for Petitioner
January 12, 1984

NO. 83-6084

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1983

Office - Supreme Court, U.S.
FILED
FEB 14 1984
ALEXANDER L. STEVAS,
CLERK

WILLIAM NEAL MOORE,

Petitioner,

v.

CHARLES BALKCOM, WARDEN
AND ARTHUR K. BOLTON,
ATTORNEY GENERAL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

SUSAN V. BOLEYN
Staff Assistant
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

Please serve:

SUSAN V. BOLEYN
132 State Judicial Bldg.
40 Capitol Square
Atlanta, Georgia 30334
(404) 656-3397

QUESTIONS PRESENTED

1.

Whether the United States Court of Appeals for the Eleventh Circuit properly applied this Court's decision in Eddings v. Oklahoma, 455 U.S. 101 (1982), in finding that the sentencer did not refuse to consider mitigating circumstances in determining that Petitioner should receive a sentence of death, but rather found that the death penalty was authorized by a statutory aggravating circumstance and a nonstatutory aggravating circumstance?

2.

Whether the United States Court of Appeals for the Eleventh Circuit properly confined its review of the imposition of the death penalty in this case to determining whether or not the death penalty had been freakishly imposed and properly declined to conduct a de novo proportionality review?

3.

Whether the United States Court of Appeals for the Eleventh Circuit properly applied the principles of Henderson v. Morgan, 426 U.S. 637 (1975) in determining that Petitioner's guilty plea was voluntarily entered, as there is no requirement that a state court accepting a guilty plea inquire into a defendant's knowledge of each of the elements of the crime?

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
REASONS FOR NOT GRANTING THE WRIT	4
I. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY FOUND NO VIOLATION OF THE CONSTITUTIONAL PRINCIPLES ENUNICATED IN THIS COURT'S DECISION IN EDDIINGS V. OKLAHOMA, 455 U.S. 104 (1982) WITH REFERENCE TO THE SENTENCER'S DECISION TO IMPOSE DEATH UPON PETITIONER.	4
II. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY ACCORDED DEFERENCE TO THE SUPREME COURT OF GEORGIA'S METHOD OF CONDUCTING PROPORTIONALITY REVIEW AND DECLINED TO CONDUCT ITS OWN DE NOVO PROPORTIONALITY REVIEW.	8
III. PETITIONER'S GUILTY PLEA COMPLIED WITH THE REQUIREMENTS OF HENDERSON V. MORGAN, 426 U.S. 637 (1976) SO AS TO SUFFICIENTLY ESTABLISH THE VOLUNTARINESS OF PETITIONER'S PLEA OF GUILTY.	12
CONCLUSION.	13
CERTIFICATE OF SERVICE.	15

TABLE OF AUTHORITIES

Cases cited: Page(s)

Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974). 6

Eddings v. Oklahoma, 455 U.S. 104 (1982) 4, 5

Gregg v. Georgia, 428 U.S. 153 (1976). . . . 9

Henderson v. Morgan, 426 U.S. 637 (1976) 12

Moore v. Balkcom, 716 F.2d 1511 (11th Cir. 1983) modified at ___ F.2d ____ No. 81-7418, December 13, 1983 . . . . . passim

Moore v. Georgia, 429 U.S. 873 (1976). . . . 1

Moore v. Georgia, 434 U.S. 878 (1977). . . . 2

Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975) 1, 2, 9

Moore v. State, 239 Ga. 67, 235 S.E.2d 519 (1977) 2

Pollinzi v. Estelle, 628 F.2d 417, (5th Cir. 1980). 2

Pulley v. Harris, ___ U.S. ___, ___ S.Ct. ___ (1984) 9

Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983). 8, 9

NO. 83-6084

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1983

WILLIAM NEAL MOORE,

Petitioner,

v.

CHARLES BALKCOM, WARDEN
AND ARTHUR K. BOLTON,
ATTORNEY GENERAL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, William Neal Moore, was indicted by the Grand Jury in the Superior Court of Jefferson County, Georgia, for the offenses of malice murder and armed robbery of Fredger Stapleton. Petitioner waived a trial by jury with respect to both charges on June 4, 1974, and entered a plea of guilty to the charges. Petitioner's sentencing hearing was set for July 17, 1974. On that date, the sentencer imposed the death penalty upon Petitioner, following the receipt of certain testimony in evidence for the Court's consideration.

The Supreme Court of Georgia affirmed Petitioner's convictions and sentences in Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975). The Supreme Court of Georgia in its opinion conducted the sentence review which is mandatory in all cases in which the death penalty has been imposed in accordance with O.C.G.A. § 17-10-35. The Supreme Court of the United States denied Petitioner's petition for a writ of certiorari on July 6, 1976 in Moore v. Georgia, 429 U.S. 873 (1976). A petition

for a declaratory judgment was denied by the Superior Court of Jefferson County and the judgment of that court was affirmed by the Supreme Court of Georgia in Moore v. State, 239 Ga. 67, 235 S.E.2d 519 (1977). The petition for certiorari to review this judgment was denied by this Court in Moore v. Georgia, 434 U.S. 878 (1977).

Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Tattnall County, Georgia. An evidentiary hearing was conducted on March 30, 1978. In an order dated July 13, 1978, the court denied Petitioner the relief sought. On October 17, 1978, the Supreme Court of Georgia denied Petitioner's application for a certificate of probable cause to appeal.

On November 22, 1978, Petitioner filed an application for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Georgia. Following a hearing on June 18, 1979, the district court granted federal habeas corpus relief, vacating Petitioner's sentence of death on the basis that the penalty was cruel and unusual under the circumstances of this case. Respondent's appealed to the Circuit Court and Petitioner cross-appealed. Following oral argument, a panel of the United States Court of Appeals for the Eleventh Circuit reversed the district court's judgment, insofar as the district court had conducted its own proportionality review, but granted habeas corpus relief on the basis that the sentencing court had unconstitutionally applied a non-statutory aggravating circumstance. The Respondent filed a suggestion for rehearing en banc based on the latter portion of the panel opinion and the petition for rehearing was granted, with the prior panel opinion dated June 23, 1983 being withdrawn and a new opinion, dated Setpember 30, 1983, being substituted in its place. In its decision of September 30, 1983, the United States Court of Appeals for the Eleventh Circuit reversed that portion of its prior opinion granting federal habeas corpus relief.

Petitioner Moore then filed a petition for rehearing and suggestion for rehearing en banc which was denied on December 13, 1983. It is the panel decision in Moore v. Balkcom, 716 F.2d 1511 (11th Cir. 1983), as modified by order of the court dated December 13, 1983, that is the subject of the instant petition for writ of certiorari.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY FOUND NO VIOLATION OF THE CONSTITUTIONAL PRINCIPLES ENUNICATED IN THIS COURT'S DECISION IN EDDINGS V. OKLAHOMA, 455 U.S. 104 (1982) WITH REFERENCE TO THE SENTENCER'S DECISION TO IMPOSE DEATH UPON PETITIONER.

Petitioner urges this Court to grant his petition for a writ of certiorari based on his contention that the United States Court of Appeals for the Eleventh Circuit failed to follow the holding of this Court in Eddings v. Oklahoma, 455 U.S. 104 (1982), in which the Court held that a sentencer may not refuse to consider as a matter of law any relevant mitigating circumstances. Eddings v. Oklahoma, supra at 113-15. The United States Court of Appeals for the Eleventh Circuit properly found the facts in this case to be distinguishable from those presented to this Court in Eddings v. Oklahoma, supra and found no constitutional error in the sentencer's imposition of the death penalty upon Petitioner. In Eddings v.Oklahoma, supra, the trial judge stated that, "in following the law," he could not 'consider the fact of this young man's violent background.'" Eddings v. Oklahoma, supra at 113. This Court interpreted this statement by the trial court in Eddings v. Oklahoma, supra, as follows:

> From this statement is is clear, that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact, rather he found that as a matter of law he was unable to even consider the evidence.

Id.

This Court went further and found that it was as if the trial judge had instructed a jury to disregard mitigating evidence as a matter of law, and found that the sentencer may determine the weight to be given relevant mitigating evidence, but may not give it no weight, i.e., exclude the evidence from consideration. Eddings v. Oklahoma, supra at 114.

The facts of this case are easily distinguishable from those found to be present in Eddings v. Oklahoma, supra. As the United States Court of Appeals for the Eleventh Circuit noted in Moore v. Balkcom, 716 F.2d 1511, 1524 (11th Cir. 1983), an interpretation of the sentencer's comments in this case, i.e., Judge Walter McMillan shows the following:

> The record indicates that Judge McMillan views the statutory aggravating circumstances and the location of the murder and robbery as so aggravating the crime as to outweigh all mitigating circumstances involved in the case. Such an evaluation comports with the constitutional requirement of an individualized sentencing decision. See Lockett v. Ohio, 438 U.S. 586. 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978); Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc). Id.

Essentially, this issue presents no federal constitutional question for this Court's resolution, but rather presents a question of fact, i.e., the interpretation of the sentencer's statements as to whether or not he viewed himself as precluded from considering mitigating factors or whether the sentencer found that the aggravating circumstances, both statutory and nonstatutory, outweighed the mitigating circumstances which Judge McMillan had already considered. In Moore v. Balkcom, supra, the court noted the statements of Judge McMillan which were also cited by the Supreme Court of Georgia as listing

mitigating circumstances found by Judge McMillan. Specifically, the judge noted that Petitioner had done "an honorable thing insofar as your true statements made, your cooperation with the officials, pleading guilty to the mercy of the court . . . " (Sentencing Hearing Transcript, p. 54). The United States Court of Appeals for the Eleventh Circuit also noted in its order of December 13, 1983, "Judge McMillan properly considered all of the evidence in mitigation before exercising his discretion to impose death." Moore v. Balkcom, 716 F.2d 1511 (11th Cir. 1983), modified at ___ F.2d ____ No. 81-7418, December 13, 1983. The Eleventh Circuit properly found that Judge McMillen understood discretionary sentencing as set forth under Georgia law at that time as contained in such cases as Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974). The United States Court of Appeals for the Eleventh Circuit properly held that "We are satisfied that the Court considered all the evidence offered in mitigation before imposing death and are satisfied that the court understood that it possessed discretion to impose a life sentence." Moore v. Balkcom, Slip. Op. at 1031.

As the United States Court of Appeals for the Eleventh Circuit noted, Judge McMillan listened to the presentation of mitigating evidence on Petitioner's behalf and asked each witness questions. (Sentencing Hearing Transcript, p. 42-48). For example, Judge McMillan asked Petitioner's brother, James Moore, whether Petitioner had ever been in any kind of trouble, how many brothers and sisters had been in Petitioner's family and the health of Petitioner's mother and father. (Sentencing Hearing Transcript, p. 43). Petitioner's brothers and sisters presented mitigating evidence by testifying that Petitioner had never been in any kind of trouble (Sentencing Hearing Transcript, p. 42); had been in the service (Sentencing Hearing Transcript, p. 42-43); that Petitioner had had no father when he grew up, and that things were "tough (Sentencing Hearing Transcript, p. 45); that Petitioner had been a "pretty good

boy" and had been drinking at the time the incident occurred (Sentencing Hearing Transcript, p. 46); and that Petitioner had been a good student, and had good grades in school (Sentencing Hearing Transcript, p. 47). Petitioner's own testimony revealed mitigating circumstances in the form of Petitioner's statement that he did not mean to kill the victim and that he was sorry. (Sentencing Hearing Transcript, p. 47). Further, Petitioner stated that the victim came out with a shotgun and it scared Petitioner into killing him. (Sentencing Hearing Trasncript, p. 48).

Judge McMillan cited the death penalty statute as requiring proof of aggravating circumstances to justify the imposition of the death penalty. (Sentencing Hearing Transcript, p. 51-52). Judge McMillan noted that discretionary sentencing was sanctioned by Georgia law, although the Justices of this Court at that time were in conflict as to whether or not there would be mandatory or discretionary sentencing in capital cases. (Sentencing Hearing Transcript, p. 52). The Court after passing sentence noted that in Georgia, it had been determined that discretionary sentencing was appropriate. (Sentencing Hearing Transcript, p. 53-55). The Court stated:

> So, I found aggravating circumstances. I also found, but I didn't need to find, for purposes of this finding, mitigating circumstances insofar as the aggravating circumstances were concerned. Mitigating means good circumstances, those being your willingness and your forthrightness in meeting what must be to you a terrible, terrible experience. So that does go to your credit, but for the purposes of this Court, for this finding, I could not in good conscience apply in your case sufficient to wipe out the aggravating statutory circumstances.

(Sentencing Hearing Transcript, p. 56).

It is clear from the facts of this case that no constitutional violation is present, but rather that as a matter of fact, the sentencer found that the statutory aggravating circumstance and the nonstatutory aggravating circumstance warranted the imposition of the death penalty, even in light of the mitigating circumstances the trial court found to be presented in the case. As aforestated, no federal constitutional question is presented for this Court's review.

II. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY ACCORDED DEFERENCE TO THE SUPREME COURT OF GEORGIA'S METHOD OF CONDUCTING PROPORTIONALITY REVIEW AND DECLINED TO CONDUCT ITS OWN DE NOVO PROPORTIONALITY REVIEW.

Petitioner contends that the sentencer imposed the death sentence upon Petitioner arbitrarily and capriciously, as he allegedly "misunderstood the range of his sentencing discretion and focused on one circumstance of the crime to the exclusion of the array of mitigating factors concerning the defendant." However, as Respondent has already stated with reference to the first reason for granting the writ raised by Petitioner, the United States Court of Appeals for the Eleventh Circuit properly determined that the sentencer in Petitioner's case had comported with the requirements of Georgia law as interpreted in Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983) The sentencer finding a statutory aggravating circumstance and a nonstatutory aggravating circumstance, and did not improperly refuse to consider mitigating circumstances, but rather, found that the aggravating circumstances justified the imposition of the death penalty. Moore v. Balkcom, supra, at 1524-1525. Therefore, Respondent does not concede in any way that the imposition of the death penalty was arbitrary or capricious in

this case, as it was authorized by a statutory aggravating factor and a nonstatutory aggravating factor as provided for under the Georgia capital sentencing scheme in Zant v. Stephens, supra.

Petitioner argues that if the Supreme Court of Georgia had applied what he contends would have been an adequate test for comparability, that the allegedly arbitrary nature of the death sentence would have been exposed. Petitioner further alleges that he was denied his opportunity to show that an inadequate test of comparability was applied and that the United States Court of Appeals for the Eleventh Circuit improperly declined to conduct its own proportionality review.

As this Court is well aware, the Georgia capital sentencing scheme, including the proportionality review inherent in the statute under mandatory appellate review, was upheld by this Court in Gregg v. Georgia, 428 U.S. 153 (1976). However, in this Court's recent decision in Pulley v. Harris, ___ U.S. ___ S.Ct. ___ (1984), the Court found that its decision in Gregg v. Georgia, supra did not require that a capital sentencing statute contain provisions for proportionality review. Pulley v. Harris, Slip. Op. at p. 8. In Pulley v. Harris, supra, this Court also noted that the focus of the Georgia statute, as interpreted in Zant v. Stephens, supra, was the jury's finding of statutory aggravating cicumstances, not the decision of the Supreme Court of Georgia findings as to proportionality. In Pulley v. Harris, supra, Slip. Op. at p. 13, this Court found that proportionality was "an additional safeguard against arbitrarily imposed death sentences." Id. In this case, Petitioner's death sentence was supported by a statutory aggravating circumstance, i.e., that the offense of murder had been committed during the course of another capital felony, to-wit armed robbery, and the Supreme Cout of Georgia properly performed its appellate review obligation in Petitioner's direct appeal to that court. Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975). Thus, the Georgia statutory

scheme was followed in this case and serves to establish that Petitioner's death sentence was validly and constitutionally imposed.

It should be noted that Petitioner did have the opportunity to present evidence and make argument on cases allegedly comparable to that of Petitioner, so as to require that a life sentence be imposed, to the Supreme Court of Georgia on direct appeal to that court. Petitioner also had the option of moving for rehearing before the Supreme Court of Georgia once the Supreme Court had entered its decision and of attaching an appendix of arguably similar cases to be considered in determining whether or not Petitioner's death sentence had been arbitrarily and capriciously imposed. Petitioner could have sought to attack the review made by that Court in such a motion for rehearing. Therefore, the statutory scheme properly operated in this case and afforded Petitioner the opportunity to present any evidence of arbitrariness, capriciousness or disproportionality with respect to the imposition of the death penalty in Petitioner's case.

Petitioner then sought to have the federal habeas corpus court conduct a de novo proportionality review of Petitioner's case, comparing it to other similar cases. The United States Court of Appeals for the Eleventh Circuit found this to be an inappropriate exercise to be undertaken by a federal habeas corpus court and reversed the district court's decision wherein the district court judge had undertaken his own disproportionality review. Moore v. Balkcom, supra at 518-519.

The basis of the decision of the United States Court of Appeal for the Eleventh Circuit was solidly grounded in federal constitutional principles and notions of comity. The United States Court of Appeals for the Eleventh Circuit did review the record and determined that the proportionality review in this case conducted by the Supreme Court "provided an adequate safeguard against the freakish imposition of capital punishment." Id. The United States Court of Appeals for the

Eleventh Circuit also properly determined that the review of the Georgia Supreme Court "did not shock the conscience." Moore v. Balkcom, supra at 1519. The United States Court of Appeals for the Eleventh Circuit properly determined that:

> A federal habeas court should not undertake a review of the state supreme court's proportionality review and, in effect, 'get out the record' to see if the state court's findings of fact, their conclusion based on a review of similar cases, was supported by the 'evidence' in the similar cases. To do so would thrust the federal judiciary into the substantive policy making area of the state. It is the state's responsibility to determine the procedure to be used, if any, in sentencing a criminal to death. See California v. Ramos, 103 S.Ct. at 3451-53.

Moore v. Balkcom, supra at 1518.

Because the Georgia death penalty statute contains a method of proportionality review which has been found to be constitutional on its face, the United States Court of Appeals for the Eleventh Circuit properly confined its examinationof the Georgia Supreme Court's appellate review to determining if such appellate review provided an adequate safeguard against the freakish imposition of capital punishment. No further review is constitutionally required. As the circuit court noted in footnote 6 of its opinion:

> A federal habeas court may not conduct a de novo proportionality review and thereby inject itself into the state sentencing procedure. Our review remains confined to whether the state sentencing procedure both on its face and as applied violates the

Eighth and Fourteenth Amendments. See Spinkellink v. Wainwright, 578 F.2d at 606 n. 28.

Moore v. Balkcom, supra at 519 n. 6.

As it is apparent that the United States Court of Appeals for the Eleventh Circuit properly examined the Supreme Court of Georgia's proportionality review procedure, as required under constitutional principles, and as Georgia's proportionality review is not constitutionally required, the issue of whether or not the Supreme Court of Georgia provided a "inadequate test fof comparability" does not present a federal constitutional question for review by this Court.

III. PETITIONER'S GUILTY PLEA COMPLIED WITH THE REQUIREMENTS OF HENDERSON V. MORGAN, 426 U.S. 637 (1976) SO AS TO SUFFICIENTLY ESTABLISH THE VOLUNTARINESS OF PETITIONER'S PLEA OF GUILTY.

Petitioner argues that his guilty plea is invalid because the record of the sentencing procedures, alone, does not demonstrate that Petitioner understood the elements of the crime. The United States Court of Appeals for the Eleventh Circuit noted that records compiled from post-conviction proceedings may supplement the trial transcript in order for a determination to be made as to whether a plea was voluntary. Moore v. Balkcom, supra at 1525, citing Pollinzi v. Estelle, 628 F.2d 417, 418 (5th Cir. 1980). The United States Court of Appeals for the Eleventh Circuit properly noted that the record in this case met the requirements of Henderson v. Morgan, 426 U.S. 637 (1976), had been met, i.e., that it had been established that Petitioner understood the constitutional protections he was waiving by entering his plea and that he understood the charges against him. Petitioner has failed to cite any constitutional protections which would afford

Petitioner the right to have any other determinations made on the record, but instead, seeks to assert as a policy matter that state courts should adopt Rule 11 of the Federal Rules of Criminal Procedure, which rule provided that each individual element of the crime be addressed in the guity plea proceedings. The United States Court of Appeals for the Eleventh Circuit in Moore v. Balkcom, supra, correctly determined that under this Court's decision in Henderson v. Morgan, supra, all that is required is that the judge "explain the statutes sufficiently to give the defendant real and adequate notice of the nature of the charge against him or find proof that the defendant in fact understood the charge." Moore v. Balkcom, supra at 1526. The United States Court of Appeals for the Eleventh Circuit properly determined that this standard was met upon reviewing the record of the guilty-plea proceeding, including Petitioner's answers to questions posed in open court and the testimony from Petitioner's attorney, at which testimony was given at the state habeas corpus hearing. The appropriate standard was applied by the United States Court of Appeals for the Eleventh Circuit and no constitutional question present itself to this Court for review.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for writ of certiorari filed on behalf of William Neal Moore, as no federal constitutional questions are presented for review by this Court.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant Attorney General

Marion O. Gordon

MARION O. GORDON
First Assistant Attorney General

WILLIAM B. HILL, JR.
Senior Assistant Attorney General

SUSAN V. BOLEYN
Assistant Attorney General

Please serve:

SUSAN V. BOLEYN
132 State Judicial Building
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3397

CERTIFICATE OF SERVICE

I, Susan V. Boleyn, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for the Respondent upon the Petitioner by depositing a copy of the same in the United States mail with proper address and adequate postage to:

Mr. Daniel J. Givelber
Donald H. Berman
Northeastern University
School of Law
400 Huntington Ave.
Boston, Massachusetts 02115

This 13th day of February, 1984.

Susan V. Boleyn

SUSAN V. BOLEYN